Supreme Court, U.S.
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No.

In the Supreme Court of the United States

BLAUSTEIN & REICH, INC.,
D/B/A/ BOB'S GUN & TACKLE SHOP,
Petitioner,

v.

CARL J. TRUSCOTT, DIRECTOR,
BUREAU OF ALCOHOL, TOBACCO, FIREARMS,
AND EXPLOSIVES,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Federally-licensed firearms dealers are required to report information from their records for purposes of tracing firearms to the Bureau of Alcohol, Tobacco, Firearms and Explosives ("ATF") only "in the course of a bona fide criminal investigation." 18 U.S.C. § 923(g)(7). ATF may not require licensees to submit reports from their records "except as expressly required by this section," § 923(g)(1)(A). ATF may require licensees to submit "record information required to be kept by this chapter," § 923(g)(5)(A). However, ATF may not prescribe any rule after the enactment of the Firearms Owners' Protection Act of 1986 requiring that licensee records "be recorded at or transferred to" a government facility, or establish "any system of registration" of firearms. § 926(a).

The issue is whether ATF's power set forth in § 923(g)(5)(A) nullifies the above limiting provisions, thereby authorizing ATF to require reporting of licensee records for possible tracing when not in the course of a bona fide criminal investigation.

PARTIES TO PROCEEDING

All parties to the proceeding are identified in the caption. Petitioner is a corporation which has no parent corporation. No publicly held company owns 10% or more of the corporation's stock.

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OPINIONS BELOW

The opinion of the court of appeals, 365 F.3d 281, is printed in the Appendix ("App.") at 1a. The unreported order denying the petition for rehearing and for rehearing *en banc* is at App. 44a. The district court's memorandum opinion, 220 F. Supp.2d 535, is at App. 21a.

JURISDICTION

On April 21, 2004, the court of appeals rendered judgment affirming the district court's order dismissing the complaint. On June 28, 2004, the court of appeals denied the petition for rehearing and for rehearing *en banc*. The Chief Justice extended until October 26, 2004, the time within which to file this petition. This Court has jurisdiction under 28 U.S.C. § 1254(l).

STATUTES AND REGULATIONS

The texts of the following are in the Appendix: 18 U.S.C. §§ 923, 926; 27 C.F.R. §§ 478.25a, 478.426.

STATEMENT OF THE CASE

(i) Proceedings in the Courts Below

Petitioner Blaustein & Reich, Inc., d/b/a Bob's Gun & Tackle Shop ("Bob's"), filed the complaint on November 23, 2001, alleging that a demand letter from the Bureau of Alcohol, Tobacco, Firearms and Explosives ("ATF") requiring Bob's to report all used firearm acquisitions was unlawful. Bob's

alleged that such reporting was not expressly required by law and was not for a bona fide criminal investigation, contrary to 18 U.S.C. § 923(g)(1)(A) and (7). Bob's also alleged that ATF's demand violated the prohibitions in § 926(a) on the transfer of licensee records to a federal facility and on any system of registration of firearms or firearms transactions.

The district court had jurisdiction under 28 U.S.C. § 1331. That court granted summary judgment for Respondent ATF Director Carl J. Truscott,[1] issuing a final judgment on September 30, 2002.

The court of appeals affirmed. On June 28, 2004, that court denied the petition for rehearing and rehearing *en banc*.

This Court granted an application for an extension of time to file this petition to and including October 26, 2004.

(ii) Statement of Facts

Bob's, a federally-licensed firearms dealer, received a demand letter from ATF requiring the reporting of all used firearm acquisitions, by make, model, caliber, and serial number, for 1999 and thereafter. Upon request by ATF, licensees are required to report a firearm disposition "in the course of a bona fide criminal investigation." 18 U.S.C. § 923(g)(7). The demand letter was not in the course of a bona fide criminal investigation. Moreover, Bob's was in compliance with all applicable provisions of law. However, the letter threatened license revocation and criminal sanctions for failure to comply.

Because it would make it easier to conduct traces, ATF supported legislation to amend § 923 that would have required dealers to report all used firearm acquisitions. "However,

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[1] Truscott is successor to Bradley A. Buckles, who was the ATF Director when this case was in the courts below.

Congress has yet to act on this legislation." ATF, *Commerce in Firearms in the United States* 26 n.40 (2000). Because Congress never acted, ATF imposed the requirements of the unenacted legislation on some 450 licensees, including Bob's. ATF then used the records provided to establish an electronic registry of the used firearm acquisitions.

ATF's criteria for sending a demand letter was that ATF had traced, in 1999, at least ten new firearms sold by a licensee within a three-year period. ATF euphemistically labeled them "crime guns," but well knew that many firearms it traces were not used in any crime.[2] ATF recognizes that meeting the criteria does not imply that a dealer has committed any violation.[3] Indeed, two of the ten traces involving Bob's were guns stolen from his customers and returned to them by police. Moreover, ATF's formula gave no consideration to sales volume. In 1999, Bob's sold 1,986 firearms, yet had only ten firearms traced.

At a later date, ATF changed the criteria to 15 firearm traces, but continued to apply the 10-trace criteria to Bob's.

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[2] *See* Brief for the Petitioner, *U.S. Dep't of Treasury, BATF, Petitioner v. City of Chicago*, No. 02-322, U.S. Supreme Court, filed Jan. 3, 2003, at 10 ("the agency requesting the trace does not inform ATF of whether possessors and their associates are ever indicted or convicted of any offense"); *id.* at 27 (tracing only identifies first retail purchaser, who "may have long since relinquished ownership of the weapon").

[3] "[T]races do not necessarily indicate illegal activity by licensed dealers or their employees." ATF, *Commerce in Firearms in the United States* 22-23 (Feb. 2000).

ARGUMENT

THE WRIT SHOULD BE GRANTED TO DECIDE WHETHER, WHERE CONGRESS ONLY AUTHORIZES ATF TO REQUIRE LICENSEES TO REPORT TRANSACTIONS IN THE COURSE OF "BONA FIDE CRIMINAL INVESTIGATIONS" AND OTHERWISE LIMITS ATF'S AUTHORITY OVER RECORDS, A PROVISION AUTHORIZING DEMANDS FOR RECORDS NULLIFIES THE LIMITING PROVISIONS

The court of appeals decided an important question of federal law that has not been, but should be, settled by this Court, and did so in a way that conflicts with relevant decisions of this Court.

First, the decision below upsets a delicate balance set by Congress regarding the privacy interests of federal firearms licensees who are in full compliance with the law. The decision elevates a single provision providing for reporting of licensee records to ATF over countervailing provisions which strictly define and limit ATF's access to records. The provisions at issue represent an historic compromise in which records concerning firearms are kept by licensees and are made accessible to ATF only for bona fide criminal investigations or other specific purposes established by law.[4] The purposes evident on the face of the statute should have resulted in the

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[4] Senator James McClure, chief sponsor of the Firearms Owners' Protection Act, noted: "The central compromise of the Gun Control Act of 1968 – the sine qua non for the entry of the Federal Government into any form of firearms regulation was this: Records concerning gun ownership would be maintained by dealers, not by the Federal Government and not by State and local governments." 131 Cong. Rec. S9163-64 (July 9, 1985).

harmonization of the provisions at issue rather than the emasculation of all but one. This is an important question of federal law that this Court should settle.

Treating such straightforward acts of Congress which are the product of historic compromises over a highly sensitive political issue in this manner can only serve to erode confidence in the executive and judicial branches by a large segment of the American population. "There is a long tradition of widespread lawful gun ownership by private individuals in this country," *Staples v. United States*, 511 U.S. 600, 610 (1994), and "roughly 50 percent of American homes contain at least one firearm of some sort." *Id.* at 614 n.8.

Second, the opinion conflicts with fundamental principles of statutory interpretation. The statute limits ATF's authority to demand records for tracing to a "bona fide criminal investigation." 18 U.S.C. § 923(g)(7). "When a statute limits a thing to be done in a particular mode, it includes a negative of any other mode." *Christensen v. Harris County,* 529 U.S. 576, 583 (2000). The demand-letter provision does not trump, but should be harmonized with, other provisions limiting requirements that licensees submit records only "as expressly required by this section," § 923(g)(1)(A), and prohibiting transfer of records to government facilities and registration of firearms. § 926(a). "A court must therefore interpret the statute 'as a symmetrical and coherent regulatory scheme,' . . . and 'fit, if possible, all parts into an harmonious whole . . . .'" *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (citations omitted).

Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984), held that, if Congress has clearly spoken to the issue, the court must apply the law without any deference to the agency's interpretation. *Brown &*

Williamson added that, even in the absence of statutory clarity, the courts should not recognize an implied delegation of power to an agency where the issue is of great public magnitude. As applied to FDA regulation of tobacco, "Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion." 529 U.S. at 160-61. That is even more the case here, where clear statutory provisions expressly prohibit the claimed agency power.

This case would give the Court an opportunity further to clarify the *Brown & Williamson* branch of the *Chevron* doctrine in the context of a statutory scheme which seeks to protect privacy interests while requiring disclosure for bona fide criminal investigations.

1. The decision in this case is the first ever by any circuit since passage of the Gun Control Act of 1968 to hold that licensees must routinely report certain transaction records to ATF where (a) the reporting is not for a bona fide criminal investigation and (b) the licensees are in full compliance with the law.[5]

ATF unsuccessfully sought legislation that would have required all licensees to report all used firearms received into inventory.[6] After Congress failed to pass that bill, ATF

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[5] "The Bureau concedes that it is not seeking the information demanded in its letter in connection with a particular criminal investigation." App. 10a n.11. "The Bureau does not assert that Bob's Gun Shop has failed to comply with any recordkeeping requirement apart from the demand letter." App. 10a n.10.

[6] ATF, *Commerce in Firearms* 26 n.40 (2000), explains:
As part of the Youth Gun Crime Enforcement Act of 1999, the President proposed that licensees be required to submit to the NTC [National Tracing Center] the serial

imposed the bill's requirements on licensees who had been the subject of at least ten firearm traces in one year where the traces were conducted within three years of the sale. ATF disregarded that a large sales volume by a licensee would mean a higher number of traces.

While ATF traces firearms for a variety of reasons, it euphemistically referred to all *traced* firearms as "crime guns" seized from "crime scenes." It sent demand letters to the 450 licensees, including Bob's, which met the above criteria, requiring the reporting of all used firearms received into inventory. ATF then entered the information into its Firearms Tracing System computers. The letter insinuated that any licensee meeting the ten-traces per year threshold may be engaged in illegal "trafficking" or selling firearms to ineligible persons.

As authority for the demand letters, ATF relied on 18 U.S.C. § 923(g)(5)(A), which provides:

> Each licensee shall, when required by letter issued by the Attorney General,[7] . . . submit on a form specified by the Attorney General, for periods and at the times specified in such letter, all record information required to be kept by this chapter or such lesser record information as the Attorney General in such letter may specify.

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numbers and other identifying information for used firearms taken into inventory. This would fill a major void in the tracing system. However, Congress has yet to act on this legislation.

[7] References were originally to the Secretary of the Treasury, but enforcement has been transferred to the Attorney General, under whom ATF now serves.

That provision, according to the decision below, trumps countervailing privacy protections which were enacted in the Firearms Owners' Protection Act ("FOPA"), P.L. 99-308, 100 Stat. 449 (1986) and in subsequent legislation. Section 923(g)(1)(A) provides that a licensee "shall not be required to submit to the Secretary reports . . . except as expressly required by this section." Section 926(a) prohibits any rule adopted after FOPA providing that required records or portions thereof "be recorded at or transferred to" a government facility, or establishing "any system of registration of firearms, firearms owners, or firearms transactions." Further, § 923(g)(1)(B)(iii) authorizes ATF to inspect licensee records to trace a firearm "in the course of a bona fide criminal investigation." Section 923(g)(7) requires a licensee to respond within 24 hours to an ATF request for records "as may be required for determining the disposition of 1 or more firearms in the course of a bona fide criminal investigation."[8]

The court below held that the demand letter violated none of these provisions.

2. Section 923(g)(1)(A) provides that licensees shall not be required to submit reports "except as expressly required by this section."[9] Several provisions expressly require

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[8] In addition to the above, an annual appropriations rider prohibits expenditure of ATF funds for "consolidating or centralizing . . . the records, or any portion thereof, of acquisition and disposition of firearms maintained by Federal firearms licensees." *E.g.*, Consolidated Appropriations Resolution, 2003, P.L. 108-7, 117 Stat. 11, 377 (2003).

[9] *See National Rifle Assoc. v. Brady*, 914 F.2d 475, 483-84 (4th Cir. 1990) ("While the information requested in the regulation may well be beneficial to BATF in its efforts to track firearm dispositions, the plain language of the statute makes clear that this is information that Congress did not wish licensees to be required to record.").

submission of reports. *See* § 923(g)(3) (multiple handgun sales), (4) (discontinuance of business), (6) (lost or stolen firearm), and (7) (disposition records in course of criminal investigation). These were the reporting obligations identified as being "expressly required." Senate Report 98-583, 98th Cong., 2d Sess., 15 & n.32 (1984).

The court of appeals obliterates the above limitation in § 923(g)(1)(A) by concluding that the demand-letter provision *itself* "expressly requires an FFL to produce record information when the Bureau issues a demand letter seeking it." App. 11a. The demand-letter provision is not, however, an "express" requirement like those in § 923(g)(3), (4), (6), and (7). It is a procedural mechanism which was to "ensure the Secretary's authority to conduct legitimate tracing activities in connection with bona fide criminal investigations." Senate Report 98-583, *supra*, at 18.

Section § 923(g)(7) requires a licensee to respond within 24 hours to a request for information about specific firearms "in the course of a bona fide criminal investigation."[10]

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[10] Elsewhere, ATF's access to licensee records is predicated on the existence of a criminal investigation. Section 923(g)(1)(A) authorizes issuance of a warrant, based on reasonable cause to believe evidence of a violation of the Act may be found, to inspect licensee records. Under the holding here, ATF could just send a demand letter for the records, and need not have reasonable cause or a warrant.

Similarly, § 923(g)(1)(B) authorizes ATF to inspect licensee records without warrant (i) "during the course of a criminal investigation" of someone other than the licensee; (ii) for ensuring compliance with record keeping requirements regarding "records relating to a firearm involved in a criminal investigation that is traced to the licensee;" and (iii) when "required for determining the disposition of one or more particular firearms in the course of a bona fide criminal investigation." The holding here would allow ATF to circumvent these limits by sending a demand letter for all such records without there being any criminal investigation.

As the court of appeals concedes, "The Bureau has some access to this information but only as authorized by statute or regulation." App. 4a. Yet the court of appeals deems § 923(g)(7) irrelevant because the demand letter was not issued in the course of a criminal investigation and did not require a response within 24 hours. App. 11a n.13. That interpretation would allow ATF to circumvent § 923(g)(7)'s "bona fide criminal investigation" requirement and compel information to be reported within 24 hours through the demand-letter provision.

ATF claims that it may need the records here should it wish to trace specific firearms in some possible future criminal investigation, but that would render insignificant the limitations in § 923(g)(1)(B)(iii) and (g)(7) that records may be required for tracing only "in the course of" a criminal investigation which is "bona fide." "When a statute limits a thing to be done in a particular mode, it includes a negative of any other mode." *Christensen v. Harris County*, 529 U.S. 576, 583 (2000). "It is familiar law that a specific statute controls over a general one . . . ." *Bulova Watch Co. v. United States*, 365 U.S. 753, 758 (1961).[11]

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[11] "However inclusive may be the general language of a statute, it 'will not be held to apply to a matter specifically dealt with in another part of the same enactment. . . . Specific terms prevail over the general in the same or another statute which otherwise might be controlling.'" *Fourco Glass Co. v. Transmirra Corp.*, 353 U.S. 222, 228-29 (1957). "We are hesitant to adopt an interpretation of a congressional enactment which renders superfluous another portion of that same law." *Kawaauhau v. Geiger*, 523 U.S. 57, 62 (1998). *See Ratzlaf v. United States*, 510 U.S. 135, 140-41 (1994) (statutory terms must not be treated "essentially as surplusage--as words of no consequence."). "It is our duty to give effect, if possible, to every clause and word of a statute, . . . rather than to emasculate an entire section, as the Government's interpretation requires."

Had Congress wished to do so, it could have required dealers to report receipt of used firearms, but did not.[12] Further, Congress was well aware that traces of firearms sold by some licensees would be greater than those sold by others, but imposed no special reporting requirements on those with more traces. "The Secretary's regulation creates a whole new recordkeeping requirement above and beyond the requirements provided for by the plain language of the statute." *NRA v. Brady*, 914 F.2d at 484.[13]

The court of appeals does not articulate any restraints imposed by the above provisions on ATF's demand-letter authority. It is as if they were never enacted.

3. The prohibition of § 926(a) applies to a "rule or regulation prescribed after the date of the enactment of" FOPA.[14] ATF's reinterpretation of the statute to authorize

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United States v. Menasche, 348 U.S. 528, 539 (1955).

[12] Indeed, Congress created one class of licensees – pawnbrokers – whose record of every acquisition would be of a used firearm. 18 U.S.C. § 921(a)(11)(C).

[13] "While the Secretary may accurately depict the enforcement problems that invalidation of this requirement may create, courts are simply not at liberty to ignore the plain language of the statute." *Id.* at 484-85.

[14] Section 926(a) provides in part:

> No such rule or regulation prescribed after the date of the enactment of the Firearms Owners' Protection Act may require that records required to be maintained under this chapter or any portion of the contents of such records, be recorded at or transferred to a facility owned, managed, or controlled by the United States or any State or any political subdivision thereof, nor that any system of registration of firearms, firearms owners, or firearms transactions or dispositions be established.

demand letters to compliant licensees routinely to report the receipt of all used firearms is a new "rule" adopted in 2000, long after enactment of FOPA.

While the demand-letter provision is a statute, a radical reinterpretation of statutory authority is a rule. *Shell Offshore Inc. v. Babbitt*, 238 F.3d 622, 630 (5th Cir. 2001), explains:

> If a new agency policy represents a significant departure from long established and consistent practice that substantially affects the regulated industry, the new policy is a new substantive rule and the agency is obliged, under the APA, to submit the change for notice and comment.

The court of appeals noted that Bob's "has shown that the demand letter in question is the first seeking information from compliant FFLs . . . ." App. 16-17a. Indeed, ATF never asserted such authority from 1968 until the demand letters in question were sent out in 2000. Its only pre-2000 statements on the issue explained that no such authority existed,[15] and it thought it needed legislation to cure the defect.

Section § 926(a) provides that ATF may not prescribe a rule after enactment of FOPA to:

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[15] In 1968, the ATF Director stated that "we have no intention of requiring law-abiding gun dealers to report their firearms transactions to us." 131 Cong. Rec. S9129 (July 9, 1985) (inserted into the record by Senator Hatch in FOPA debates as "clarifying the record information submission requirement for firearms licensees"). A 1978 ATF Order stated: "The purpose of a demand letter is to obtain information concerning the movement of firearms . . . which may be unlawful . . . ." Gun Control and Constitutional Rights: Hearing Before the Subcom. on the Constitution, Com. on the Judiciary, U.S. Senate, 96th Cong., 2d Sess., at 262-63 (1981).

> require that records required to be maintained under this chapter or any portion of the contents of such records, be recorded at or transferred to a facility owned, managed, or controlled by the United States . . . .

Section § 926(a) also prohibits the establishment of "any system of registration of firearms, firearms owners, or firearms transactions or dispositions."[16] The records herein are transferred to ATF and the information entered into its electronic database.

The court of appeals stressed that the demand letter was sent to "only" 450 licensees. Yet they are high volume – that is why they have more traces than others – and their reporting must include tens of thousands of firearm acquisitions. Section 926(a) applies to "*any portion* of the contents of such records," and prohibits "*any system* of registration of firearms, firearms owners, or firearms transactions," which encompasses the used firearms received and owned by licensees.[17] Nothing in § 926(a) suggests that there is a threshold number of licensees, or transactions, below which § 926(a) does not apply.

The use of the demand-letter authority was intended to be limited to real criminal investigations and non-compliant

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[16] "Read naturally, the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.' *Webster's Third New International Dictionary* 97 (1976). Congress did not add any language limiting the breadth of that word . . . ." *United States v. Gonzales*, 520 U.S. 1, 5 (1997).

[17] While the registry of used firearms received by 450 licensees does not include all firearms nationwide, it is nonetheless encompassed in the terms "*any* system of registration of firearms." *Cf.* 26 U.S.C. §§ 5841, 5845(a) (providing for a "central registry of all firearms in the United States," but defining "firearm" narrowly).

licensees. It was not intended to trump the provisions of FOPA which set limits on ATF's authority.

The demand-letter provision "is based on existing Treasury regulations describing activities which facilitate the Secretary's ability to trace the disposition of firearms in connection with criminal investigations." Senate Report 98-583, 98th Cong., 2d Sess., 17 (1984). "The purpose of [this provision] is to clarify and ensure the Secretary's authority to conduct legitimate tracing activities in connection with bona fide criminal investigations."[18] *Id.* at 18. However, the authority granted under that and other provisions:

> are not to be construed to authorize the United States . . . to use the information obtained from any records or form which are required to be maintained for inspection or submission by licensees under Chapter 44 to establish any system of registration of firearms, firearms owners, or firearms transactions or dispositions.

Id.

The records demanded here were unrelated to any bona fide criminal investigation. Contrary to § 926(a), ATF's policy is a new rule which requires "any portion" of required licensee records to be recorded at and transferred to a government facility, and which constitutes a "system of registration of firearms."

4. ATF's demand-letter program adversely affects

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[18] Senator Hatch explained about the 1968 demand-letter regulation which FOPA would codify: "In order to facilitate tracing of firearms used in violent crimes, licensed dealers currently are required to provide the Secretary of Treasury with information about specific weapons upon request." 131 Cong. Rec. S8691 (June 24, 1985).

hundreds of licensees nationwide. Moreover, the decision here is a serious breech of Congress' fundamental statutory scheme under which licensees constitute the repository of information on firearms other than in the specific instances spelled out by statute, such as reporting information for a bona fide criminal investigation.

No circuit conflict exists because the issue has not been extensively litigated. However, a district court has declared ATF's program at issue here to be unlawful. *J & G Sales, Ltd. v. Edgar A. Domenech, Acting Director, Bureau of Alcohol, Tobacco, Firearms and Explosives*, CV 03-2263-PCT-PGR, D. Ariz., *notice of appeal filed*, Sept. 28, 2004 (9th Cir.). By Judgment entered August 5, 2004, Hon. Paul G. Rosenblatt found that "the demand letter is an unlawful request for its FFL records outside the scope of BATFE's statutory authority." The court ordered that ATF "is enjoined from seeking to enforce its . . . demand letter issued to Plaintiff." *Id.* By memorandum Order entered August 5, 2004, the court explained in detail why the demand letter, since it was not issued in the course of a bona fide criminal investigation, is unlawful.

Moreover, the decision is in conflict with a prior Fourth Circuit precedent. *RSM, Inc. v. Buckles*, 254 F.3d 61, 68 (4th Cir. 2001), sought to reconcile the Gun Control Act's privacy protections with ATF's authority to require licensees to report information. *RSM* upheld a demand letter requiring 41 dealers to report information on transactions "[b]ecause BATF's issuance of the letter was limited to federal firearms licensees who had violated federal law in failing to comply with firearms

trace requests . . . ."[19] *Id.* at 63.

RSM declared that "the [demand-letter] statute does not grant BATF an unbounded delegation of authority to request record information," "is not a limitless delegation of authority to BATF to request record information," and "cannot be construed in an open-ended fashion." *Id.* at 66-67. *RSM* explained:

> [S]ection 923(g)(1)(A) provides that FFLs [federal firearms licensees] "shall not be required to submit to the Secretary reports and information with respect to such records and the contents thereof, except as expressly required by this section." . . . Section 923(g)(1)(A)'s express limitation on the Secretary's authority would be nullified if section 923(g)(5)(A) were interpreted to permit the Secretary to issue demand letters for any purpose. Likewise, while section 926(a) does not directly prohibit BATF's issuance of the letter in this case, that provision clearly demonstrates Congress' concern about any attempt by BATF to establish a national firearms registry. Section 926(a) would be rendered meaningless if BATF could issue limitless demand letters under section 923(g)(5)(A) in a backdoor effort to avoid section 926(a)'s protections for law-abiding firearms owners.

Id. at 67.

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[19] The district court in that case had invalidated even that type of demand letter as violative of § 926(a). *RSM, Inc. v. Buckles*, 94 F. Supp. 2d 692 (D. Md. 2000).

RSM upheld the demand letter there because it was narrowly tailored to apply only to licensees who failed to comply with lawful trace requests and would terminate once they did comply. *Id.* But "Congress did not intend to give BATF carte blanche with regard to informational requests from federal firearms licensees." *Id.* at 69. The decision here does give ATF carte blanche by nullifying the provisions enacted by Congress to limit ATF's authority.

5. The demand letter was arbitrary, capricious, and contrary to law because the criteria for selection are irrational and because it is based on inaccurate factual allegations which the recipient had no opportunity to rebut.

The letter is a form letter which was sent to hundreds of licensees, all with the same allegation that "crime guns" seized from "crime scenes" had been traced to each such licensee. JA 54. In reality, the mere fact of having been *traced* is the real criterion, and the trace may have nothing to do with any crime.

ATF never produced evidence that any of the ten traces of Bob's involved "crime guns." Bob's introduced evidence that "two firearms were traced because they were stolen from the individuals to whom Bob's Gun Shop sold them."[20] App. 6a n.7. Bob's customers were crime victims, not criminals. Yet the premise of the selection criteria of ten traced guns was that the licensee might be involved in "illegal firearms trafficking" or that "you are also selling a high volume of secondhand guns used in crime." App. 7a.

Moreover, ATF predicated its demand based on the arbitrary number of ten firearms having been traced in one year,

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[20] Another gun was traced after its owner was charged with carrying a concealed weapon, which was dismissed.

without any consideration of sales volume.[21] Bob's transferred nearly 2000 firearms in 1999. Noting that "trace data are not controlled for dealer sales volume," the Inspector General has explained:

> Large-scale FFLs [Federal Firearms Licensees] may have more guns traced to them simply because they sell more guns than smaller FFLs. . . . [A] hypothetical FFL selling 40 guns a year of which 8 are subsequently traced as crime guns would be a much greater concern than a dealer selling 2,000 guns of which 15 are subsequently traced.

U.S. Dept. of Justice, Office of the Inspector General, Evaluation & Inspections Division, *Inspections of Firearms Dealers by the Bureau of Alcohol, Tobacco, Firearms & Explosives*, Report No. I-2004-005 (July 2004), at 26, www.usdoj.gov/oig/inspection/ATF/0405/final.pdf.[22]

Indeed, ATF changed its criteria from 10 to 15 traces – making Bob's situation identical to the above hypothetical – yet ATF continued to apply the old criteria to Bob's. This demonstrates that ATF does not need the information after all and application of the old criteria is irrational.

Trace information compiled by ATF does not constitute a reliable index of firearms used in crime. A study by the Congressional Research Service explained:

[A] law enforcement officer may initiate a trace

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[21] *See Hamilton v. Beretta U.S.A. Corp.*, 96 N.Y.2d 222, 750 N.E.2d 1055, 237 n.5 (N.Y. App. 2001) (a large number of traces may "merely reflect[] a high volume of legal sales").

[22] Although this publication is recent, Bob's has made the same argument since the beginning of this litigation.

> request for any reason. No crime need be involved. No screening policy ensures or requires that only guns known or suspected to have been used in crimes are traced. . . . [T]he extent to which trace requests focus on guns not involved in crimes cannot be determined.[23]

In short, because ATF's criteria was fundamentally flawed, ATF failed to "examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *Motor Vehicle Manufacturers Ass'n. v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 43 (1983). *See id.* at 56 ("the agency has failed to offer the rational connection between facts and judgment required to pass muster under the arbitrary and capricious standard").

6. This case involves one of those unique and controversial issues in which this Court's intervention is

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[23] Congressional Research Service, *Report for Congress; "Assault Weapons": Military Style Semiautomatic Firearms Facts and Issues, 1992*, App. B, at 66. The report explained further, *id.* at 70:

> For example, a trace may be conducted on a firearm found at the residence of a suspect though the firearm itself is not associated with a criminal act. Traces may also be requested with respect to abandoned firearms, those found by chance, those seen by officers for sale at guns shows or pawn shops, or those used by suicide victims. In addition, traces may be requested with respect to firearms seized pursuant to an investigation not directly related with a violent criminal offense, such as tax evasion or a technical violation of the Gun Control Act provisions. It is not possible to identify how frequently firearms traces are requested for reasons other than those associated with violent crimes.

warranted. Like firearms, tobacco has been the subject of public controversy and hard-fought legislative compromises. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000), aptly begins its discussion by stating:

> Regardless of how serious the problem an administrative agency seeks to address, however, it may not exercise its authority "in a manner that is inconsistent with the administrative structure that Congress enacted into law." . . . And although agencies are generally entitled to deference in the interpretation of statutes that they administer, a reviewing "court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."

Id. at 125-26, quoting *Chevron*, 467 U.S. at 842-843.

Congress directly spoke to the issue here in providing that a licensee shall not be required to submit reports from transaction records "except as expressly required by this section," § 923(g)(1)(A), and restricting record access for tracing to be "in the course of a bona fide criminal investigation." §§ 923(g)(1)(B)(iii), 923(g)(7). "Under *Chevron*, a reviewing court must first ask 'whether Congress has directly spoken to the precise question at issue.' . . . If Congress has done so, the inquiry is at an end . . . ." *Brown & Williamson*, 529 U.S. at 132 (citation omitted). Yet the panel here elevated a single provision over restrictive ones, nullifying the latter. This is contrary to *Brown & Williamson*:

> In determining whether Congress has specifically addressed the question at issue, a reviewing court should not confine itself to examining a particular statutory provision in

> isolation. The meaning--or ambiguity--of certain words or phrases may only become evident when placed in context. . . . It is a "fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." . . . A court must therefore interpret the statute "as a symmetrical and coherent regulatory scheme," . . . and "fit, if possible, all parts into an harmonious whole . . . ."

529 U.S. at 132-33 (citations omitted).

In the legislative development of the Gun Control Act, not a single hint exists that ATF would have the power claimed here. *See Brown & Williamson*, 529 U.S. at 147 ("Given the economic and political significance of the tobacco industry at the time, it is extremely unlikely that Congress could have intended to place tobacco within the ambit of the FDCA absent any discussion of the matter."). Indeed, the only "discussion of the matter" was Senator Hatch's undisputed explanation of the demand letter provision that licensees are required to provide "information about specific weapons upon request." 131 Cong. Rec. S8691(June 24, 1985).[24] Senator Hatch also inserted into the record, without dispute, a statement by the ATF Director that ATF had "no intention of requiring law abiding gun dealers to report their firearms transactions to us." 131 Cong. Rec.

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[24] As the sponsor of the provision, Senator Hatch's explanation of its purpose "deserves to be accorded substantial weight in interpreting the statute." *FEA v. Algonquin SNG, Inc.*, 426 U.S. 548, 564 (1976). *See also Schwegmann Bros. v. Calvert Corp.*, 341 U.S. 384, 394-395 (1951) ("It is the sponsors that we look to when the meaning of the statutory words is in doubt").

S9129 (July 9, 1985).

Moreover, Congress enacted specific prohibitions on agency action. *Brown & Williamson* explains:

> Finally, our inquiry into whether Congress has directly spoken to the precise question at issue is shaped, at least in some measure, by the nature of the question presented. Deference under *Chevron* to an agency's construction of a statute that it administers is premised on the theory that a statute's ambiguity constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps. *See Chevron*, 467 U.S. at 844. In extraordinary cases, however, there may be reason to hesitate before concluding that Congress has intended such an implicit delegation.

529 U.S. at 159. Given the always visible and sometimes rancourous debate on gun control, whether the agency may demand routine transaction information from licensees is hardly a detail that Congress would have implicitly delegated to the agency.

The provisions at issue are pillars of hard-won compromises, the core of which is the concession that licensees must keep records on firearm transactions in exchange for the promise that the government will not have access to the records except when necessary for a bona fide criminal investigation.[25]

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[25] *See Board of Governors, FRS v. Dimension Financial*, 474 U.S. 361, 373-74 (1986) ("the final language of the legislation may reflect hard-fought compromises. . . . The statute may be imperfect, but the Board has no power to correct flaws that it perceives in the statute it is empowered to administer.").

Brown & Williamson observes:

> Owing to its unique place in American history and society, tobacco has its own unique political history. Congress, for better or for worse, has created a distinct regulatory scheme for tobacco products, squarely rejected proposals to give the FDA jurisdiction over tobacco, and repeatedly acted to preclude any agency from exercising significant policymaking authority in the area. Given this history and the breadth of the authority that the FDA has asserted, we are obliged to defer not to the agency's expansive construction of the statute, but to Congress' consistent judgment to deny the FDA this power.

529 U.S. at 159-60.

Despite several provisions restricting ATF's access to records to particular purposes, the court of appeals here rendered such provisions lifeless in the face of a supposed delegation to demand records for any purpose or for no purpose.[26] *Brown & Williamson* forbids such an implied delegation:

> Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion. To find that the FDA has the authority

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[26] "An agency may not confer power upon itself. To permit an agency to expand its power in the face of a congressional limitation on its jurisdiction would be to grant to the agency power to override Congress." *Louisiana Pub. Serv. Comm'n. v. FCC*, 476 U.S. 355, 374-75 (1986).

> to regulate tobacco products, one must not only adopt an extremely strained understanding of "safety" as it is used throughout the Act -- a concept central to the FDCA's regulatory scheme -- but also ignore the plain implication of Congress' subsequent tobacco-specific legislation. It is therefore clear, based on the FDCA's overall regulatory scheme and the subsequent tobacco legislation, that Congress has directly spoken to the question at issue and precluded the FDA from regulating tobacco products.[27]

529 U.S. at 160-61.

The reality here is that ATF was dissatisfied that Congress failed to enact legislation requiring licensees to report receipt of used firearms, and decided to impose the requirement by fiat on selected licensees. *Brown & Williamson* admonishes:

> Nonetheless, no matter how "important, conspicuous, and controversial" the issue, . . . an administrative agency's power to regulate in the public interest must always be grounded in a valid grant of authority from Congress. And "'in our anxiety to effectuate the congressional purpose of protecting the public, we must take care not to extend the scope of the statute beyond the point where Congress indicated it

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[27] "It is highly unlikely that Congress would leave the determination of whether an industry will be . . . rate-regulated to agency discretion -- and even more unlikely that it would achieve that through such a subtle device as permission to 'modify' rate filing requirements." *MCI Telecommunications Corp. v. AT & T Co.*, 512 U.S. 218, 231 (1994).

would stop.'"

529 U.S. at 161 (citations omitted).

This case presents an opportunity for this Court further to expand its jurisprudence related to the reconciliation of statutory provisions concerning the limits of agency regulatory power over a controversial issue on which Congress sought to achieve a delicate balance.

CONCLUSION

This Court should grant this petition for a writ of certiorari.

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APPENDIX

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United States Court of Appeals,
Fourth Circuit.

BLAUSTEIN & REICH, INCORPORATED, d/b/a Bob's Gun & Tackle Shop, Plaintiff-Appellant,
v.
Bradley A. BUCKLES, Director, Bureau of Alcohol, Tobacco, Firearms, and Explosives, Defendant-Appellee.

No. 02-2329.

Argued: Oct. 30, 2003.
Decided: April 21, 2004.

Before WILKINS, Chief Judge, and NIEMEYER and SHEDD, Circuit Judges.

Affirmed by published opinion. Judge Shedd wrote the opinion, in which Chief Judge Wilkins and Judge Niemeyer joined.

COUNSEL

ARGUED: Stephen Porter Halbrook, Fairfax, Virginia, for Appellant. Lewis Stanley Yelin, Appellate Staff, Civil Division, United States Department of Justice, Washington, D.C., for Appellee. **ON BRIEF:** Richard E. Gardiner, Fairfax, Virginia, for Appellant. Robert D. McCallum, Jr., Assistant Attorney General, Paul J. McNulty, United States Attorney, Mark B. Stern, Michael S. Raab, Appellate Staff, Civil Division, United States Department of Justice, Washington,

D.C.; Joel J. Roessner, Deputy Associate Chief (Litigation), Abigail Roth, Lauren L. Bernick, Office of Chief, Bureau of Alcohol, Tobacco, Firearms & Explosives, Washington, D.C., for Appellee.

OPINION

SHEDD, Circuit Judge:

In February 2000, the Bureau of Alcohol, Tobacco, Firearms, and Explosives (the Bureau)[1] sent letters to approximately 450 federally licensed firearms dealers--fewer than one percent of the more than 80,000 such dealers throughout the nation--demanding information relating to their acquisitions of secondhand firearms in 1999. Blaustein & Reich, Inc., d/b/a Bob's Gun & Tackle Shop (Bob's Gun Shop), a licensed dealer in Norfolk, Virginia, is one of the dealers that received this demand letter.

Rather than produce the information requested by the Bureau, Bob's Gun Shop filed suit, claiming the Bureau exceeded its statutory and regulatory authority in issuing the demand letters. Bob's Gun Shop also asserted that the criteria used by the Bureau to target the selected dealers were arbitrary and capricious.

The district court granted summary judgment in favor

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[1] Congress recently reconfigured the Bureau of Alcohol, Tobacco, and Firearms, changing its name in the process to the Bureau of Alcohol, Tobacco, Firearms, and Explosives. Homeland Security Act of 2002, Pub.L. No. 107-296, § 1111(a)(1), 116 Stat. 2135, 2274 (2002).

of the Bureau, and Bob's Gun Shop now appeals.[2] We affirm.

I.

The Gun Control Act (GCA) of 1968, Pub.L. No. 90-618, 82 Stat. 1213 (1968)(codified as amended at 18 U.S.C. §§ 921-930), authorizes the Bureau to license manufacturers, importers, and dealers of firearms. *See* 18 U.S.C. § 923(a).[3] The Bureau is required to issue a license to any applicant that meets all the statutory qualifications and agrees to abide by the applicable laws. *Id.* § 923(d). A manufacturer, importer, or dealer that holds such a license is commonly referred to as a federal firearms licensee (an FFL). Bob's Gun Shop is an FFL dealer.

Pursuant to both its statutory and regulatory authority, the Bureau requires all FFLs to maintain extensive records relating to the firearms they manufacture, import, receive, or

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[2] Bob's Gun Shop suggests this case is moot because the Bureau changed some of the selection criteria for its new demand letter issued in 2002. We disagree. The changed criteria apply only to demand letters issued after 2002. Thus, the change in criteria does not affect the issue in this case--whether the criteria used to select Bob's Gun Shop to receive the 2000 demand letter were arbitrary and capricious.

[3] The GCA originally granted the Secretary of the Treasury the authority to issue licenses. The Secretary delegated this authority to the Bureau. As part of the Homeland Security Act of 2002, the licensing authority was transferred to the Department of Justice. Pub.L. No. 107-296, § 1112(f)(6), 116 Stat. 2135, 2276 (2002). The Attorney General of the United States, in turn, delegated the licensing authority to the newly reconfigured Bureau. 28 C.F.R. § 0.130(a)(1). For sake of simplicity, we refer to the Bureau as the governmental agency empowered by Congress to perform the functions relevant to this case.

sell. *See, e.g., id.* § 923(g)(1)(A); 27 C.F.R. § 478.121(a).[4] For dealers, this documentation includes the name of the firearm's manufacturer and/or importer, model, serial number, type, caliber or gauge, date of sale or receipt, and name and address of the transferor or transferee. 27 C.F.R. § 478.125(e). The Bureau has some access to this information but only as authorized by statute or regulation. The Bureau may, for instance, inspect an FFL's records without warrant to determine the disposition of a particular firearm during the course of a criminal investigation. 18 U.S.C. § 923(g)(1)(B)(iii). The Bureau may also require FFLs to provide record information by telephone to help determine the disposition of a particular firearm in the course of a criminal investigation. 18 U.S.C. § 923(g)(7). An FFL must respond to such a request within twenty-four hours. *Id.*

Based on its authority to request record information from FFLs, the Bureau has created a firearms tracing system to track the movement of a particular firearm from its manufacturer to the retail dealer and ultimately to the firearm's first retail buyer. The Bureau has established the National Tracing Center (NTC) to conduct this tracing function. A firearms trace typically ensues after a law enforcement agency recovers a "crime gun"--a firearm recovered from a crime scene or from a suspect, felon, or other prohibited person. J.A. 85. The law enforcement agency--local, state, federal, or international--contacts the NTC. Based on the make of the

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[4] Our prior cases dealing with the extent of the Bureau's authority refer to 27 C.F.R. § 178, not § 478. As part of the reconfiguration of the Bureau and the transfer of some of its functions from the Department of the Treasury to the Department of Justice, § 178 was recently redesignated as § 478. *See* 68 Fed.Reg. 3750 (Jan. 24, 2003).

firearm, the NTC contacts the manufacturer of the firearm and tracks the movement of the weapon through the chain of distribution ultimately to the FFL dealer who sold the firearm to the first nonlicensee, a retail purchaser. When requested by the NTC, the FFL in the chain of distribution must report all or any portion of the information it is statutorily required to maintain for each firearm, including the name and address of the individual or entity who purchased the firearm.

This tracing system breaks down once the Bureau determines that the first retail buyer sold or otherwise transferred the firearm to another because retail buyers are not required to maintain records of any "secondhand" sales or transfers. The Bureau must then rely primarily on investigative interviews of the individuals involved in the secondhand chain of distribution to have any hope of tracing a firearm. These interviews are so time-consuming and often unproductive that the Bureau rarely performs an investigative trace of a secondhand firearm.

FFL dealers, on the other hand, are required to maintain records of secondhand firearms that they receive or sell. 27 C.F.R. § 478.125(e). This information, however, is difficult for the Bureau to access, because once the initial chain of distribution among FFLs is broken, the Bureau does not typically know which FFL dealer received or sold a particular secondhand firearm without conducting an investigative trace.

In the last several years, the Bureau has increased its efforts to trace crime guns and analyze the data relating to these traces.[5] Based on traces performed in 1999, the Bureau

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[5] In February 2000, the Bureau published a comprehensive report, *Commerce in Firearms in the United States,* that contains much of the data and analysis the Bureau relied on in determining which FFL dealers should

determined that just 1.2% of FFL dealers-- approximately 1,000 of the more than 80,000 FFL dealers--accounted for more than half of all crime guns traced. During this same period, the Bureau also determined that approximately 450 FFL dealers had traced to them ten or more crime guns with a "time-to-crime" of three years or less. Time-to-crime is the time from the retail sale of a firearm to the time it is recovered at a crime scene or is traced.[6] The average time-to-crime is six years.

Based on this data, the Bureau sent demand letters to the approximately 450 FFL dealers identified as having ten crime guns with a time-to-crime of three years or less. The demand letter required the selected FFLs to produce certain record information relating to all secondhand firearms it acquired in 1999. Bob's Gun Shop was among the FFL dealers that received the Bureau's letter. It is undisputed that Bob's Gun Shop had ten crime guns with a time-to-crime of three years or less traced to it in 1999.[7]

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receive its demand letter.

[6] The Bureau imprecisely defined "time-to-crime" in its demand letter. It is clear, however, that the Bureau used the broader definition of "time-to-crime" in *Commerce in Firearms in the United States* in its selection criteria.

[7] Bob's Gun Shop argues that at least some of the traces should not be counted because the particular guns did not end up at a crime scene through any fault of Bob's Gun Shop or the individual to whom it sold the firearm. For instance, two firearms were traced because they were stolen from the individuals to whom Bob's Gun Shop sold them.

Whether Bob's Gun Shop or its buyers were involved in any wrongdoing relating to any particular firearm that was traced is immaterial. The Bureau based its selection on which FFL dealers had ten or more qualified traces. The Bureau did not include in its criteria whether a particular trace implicated the FFL dealer in illegal trafficking of firearms.

The Bureau's demand letter stated that its research revealed that "a high volume of gun traces with a short 'time-to-crime' may be an indicator of illegal firearms trafficking." J.A. 54. The Bureau also asserted that the targeted dealers' unusually high number of traces of new firearms "may mean that you are also selling a high volume of secondhand guns used in crime." *Id.* The letter assured the targeted FFL dealers, however, that the data did not necessarily indicate that the FFL dealers had violated any gun control laws or regulations. Nevertheless, the Bureau demanded that the targeted FFL dealers provide some limited information regarding all of the secondhand firearms they acquired in 1999 for use in tracing secondhand firearms recovered at crime scenes.

II.

Rather than comply with the Bureau's demand letter, Bob's Gun Shop filed suit seeking declaratory and injunctive relief. In particular, Bob's Gun Shop claimed that the demand letter exceeded the Bureau's statutory authority to obtain information and, in effect, created a national firearms registry. It also alleged that the Bureau's criteria for selecting the FFL dealers--those having ten crime gun traces without any consideration of the particular dealer's sales volume--was arbitrary and capricious.

In a thorough opinion, the district court granted summary judgment in favor of the Bureau as to all of the claims raised by Bob's Gun Shop. *Blaustein & Reich, Inc. v. Buckles,* 220 F.Supp.2d 535 (E.D.Va.2002). After the district court

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It is undisputed that Bob's had at least ten firearms traced to it in 1999 and these firearms had a time-to-crime of three years or less.

denied its motion to alter or amend the judgment, Bob's Gun Shop filed this appeal.

III.

We review the district court's grant of summary judgment de novo. *Bryant v. Bell Atl. Md., Inc.*, 288 F.3d 124, 132 (4th Cir.2002). Although we view the evidence in the light most favorable to the non-moving party,[8] we review any conclusions of law de novo. *Dixon v. Edwards*, 290 F.3d 699, 710 (4th Cir.2002). In particular, we review questions of statutory interpretation de novo. *United States v. Abuagla*, 336 F.3d 277, 278 (4th Cir.2003).

IV.

A.

[1] Bob's Gun Shop argues that the Bureau may seek records and information under its demand letter authority only in the course of a criminal investigation or if the FFL has failed to comply with other reporting requirements of the GCA. We disagree.

As part of the Firearms Owners' Protection Act (FOPA) of 1986, Pub.L. No. 99-308, § 103, 100 Stat. 449 (1986), which amended the GCA, Congress gave the Bureau broad authority to seek, by demand letter, all record information that FFLs are required to maintain. The 1986 amendment provides:

> Each licensee shall, when required by letter

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[8] The facts are not in dispute. The district court adopted the statement of facts in the Bureau's memorandum in support of its motion for summary judgment because Bob's Gun Shop did not take issue with that statement. Bob's Gun Shop does not contest the district court's adoption of the Bureau's statement of facts.

> issued by the [Bureau], and until notified to the contrary in writing by the [Bureau], submit on a form specified by the [Bureau], for periods and at the times specified in such letter, all record information required to be kept by this chapter or such lesser record information as the [Bureau] in such letter may specify.

18 U.S.C. § 923(g)(5)(A).[9]

Under the GCA, Bob's Gun Shop is required, as an FFL dealer, to maintain a complete set of records regarding all firearms, including secondhand firearms, that it acquires or transfers. *See* 18 U.S.C. § 923(g)(1)(A); 27 C.F.R. § 478.121. For each firearm that it receives, Bob's Gun Shop must keep a record of the name and address of the person from whom it was received, the date of receipt, its manufacturer and/or importer, serial number, model, type, and caliber or gauge. *See* 27 C.F.R. § 478.125(e).

The Bureau's demand letter requests only a portion of the information that Bob's Gun Shop is required to maintain. Specifically, the demand letter seeks only the name of the firearm's manufacturer and/or importer, its model, caliber or gauge, and serial number. The Bureau specifically directed the FFL dealers not to provide the name and address of the individual from whom the FFLs acquired the firearm. Thus, the Bureau acted within its statutory authority under 18 U.S.C. § 923(g)(5)(A) when it issued the demand letter in question.

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[9] The demand letter also required the recipients to continue to submit reports of their secondhand firearm acquisitions on a quarterly basis until the Bureau advised otherwise. Section 923(g)(5)(A) authorizes the Bureau to require continuing reports.

Nevertheless, Bob's Gun Shop contends that another FOPA provision, now codified at 18 U.S.C. § 923(g)(1)(A), limits the Bureau's authority to issue demand letters. This provision, although it requires FFLs to "maintain ... records of importation, production, shipment, receipt, sale or other disposition of firearms" in their possession, also provides that these FFLs "shall not be required to submit to the [Bureau] reports and information with respect to such records and the contents thereof, *except as expressly required by this section.*" 18 U.S.C. § 923(g)(1)(A)(emphasis added). Bob's Gun Shop contends, in effect, that § 923(g)(1)(B) is the only part of § 923 that defines when the Bureau can seek information from FFLs. Subsections of 923(g)(1)(B) authorize the Bureau to inspect or examine the records that an FFL is required to maintain to ensure that FFLs are complying with their record keeping obligations[10] or to determine the disposition of a firearm in the course of a criminal investigation.[11] *Id.* § 923(g)(1)(B)(ii)-(iii).[12] Bob's Gun Shop argues that the Bureau's demand letter

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[10] The Bureau does not assert that Bob's Gun Shop has failed to comply with any recordkeeping requirement apart from the demand letter.

[11] The Bureau concedes that it is not seeking the information demanded in its letter in connection with a particular criminal investigation.

[12] Section 923(g)(1)(B)(ii)-(iii) states:

> The [Bureau] may inspect or examine the inventory and records of a ... licensed dealer without such reasonable cause or warrant--...
> (ii) for ensuring compliance with the record keeping requirements of this chapter ...; or
> (iii) when such inspection or examination may be required for determining the disposition of one or more particular firearms in the course of a bona fide criminal investigation.

does not fall within these specific circumstances, so the Bureau has no authority to require Bob's Gun Shop to produce the information requested in the demand letter.[13]

This argument ignores the plain language of § 923(g)(1)(A), which protects FFLs from reporting requirements "except as expressly required by this section." Section 923(g)(5)(a) expressly requires an FFL to produce record information when the Bureau issues a demand letter seeking it.[14] Thus, we hold that the Bureau, when acting pursuant to § 923(g)(5)(A), is not restricted to issuing demand letters in connection with a criminal investigation or to noncompliant FFLs.

B.

[2] Bob's Gun Shop also contends that the Bureau's demand letter violates the statutory ban on creating a national registry of firearms. It argues that the Bureau's demand letter

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[13] Bob's Gun Shop also argues that § 923(g)(7) limits the Bureau's ability to seek record information to firearm traces in specific criminal investigations. Section 923(g)(7) does not expressly limit the Bureau's authority to demand information. Instead, it merely requires an FFL, when the Bureau makes a request in connection with the disposition of a firearm in the course of a criminal investigation, to produce record information within twenty-four hours. The demand letter in this case does not relate to a trace being conducted in the course of a criminal investigation and does not require Bob's Gun Shop to produce any information within twenty-four hours. Thus, § 923(g)(7) does not limit the Bureau's authority to issue demand letters like the one issued to Bob's Gun Shop.

[14] Section 923(g)(5)(A) contains a condition precedent. It requires an FFL to submit record information to the Bureau but only if the Bureau issues a demand letter requesting it. This condition precedent does not negate the fact that § 923(g)(5)(A) contains an *express requirement* that is provided for in § 923(g)(1)(A).

authority, which is granted by statute at § 923(g)(5)(A) and by regulation at 27 C.F.R. § 478.126, is limited by both 18 U.S.C. § 926(a) and a rider that has accompanied every enactment providing appropriations to the Bureau since 1978.

First, we conclude that the limitation in § 926(a) does not apply to the Bureau's regulatory demand letter authority. Section 926(a) provides in pertinent part:

> *No such rule or regulation prescribed after the date of the enactment of the Firearms Owners' Protection Act [in 1986]* may require that records required to be maintained under this chapter or any portion of the contents of such records, be recorded at or transferred to a facility owned, managed, or controlled by the United States ..., nor that any system of registration of firearms, firearms owners, or firearms transactions or dispositions be established.

(Emphasis added). It is clear from the plain language of this statute that Congress prohibits the Bureau or any other federal agency from promulgating any new rules or regulations that would create a national firearms registry. What is equally clear from the plain language of this statute is that its limitations do not apply to rules or regulations that were prescribed by a federal agency before the enactment of FOPA in 1986. The Bureau's regulation authorizing it to issue demand letters, found at 27 C.F.R. § 478.126, was promulgated in 1968. 33 Fed.Reg. 18,555 (Dec. 14, 1968). Thus, the statutory prohibition in § 926(a) on new rules and regulations

does not apply to the Bureau's regulatory demand letter authority under § 478.126.[15]

Second, we also conclude that the annual appropriations riders do not prohibit the Bureau from issuing the demand letter in this case. The rider prohibits the Bureau from spending funds for salaries and administrative expenses "in connection with consolidating or centralizing ... the records, or any portion thereof, of acquisition and disposition of firearms maintained by" FFLs. *See, e.g.,* Appropriations, 2000--Treasury, Postal Service, Executive Office of the President, and General Government, Pub.L. No. 106-58, 113 Stat. 430 (1999). Bob's Gun Shop contends that the Bureau's demand letter violates the rider because it effectively consolidates and centralizes records. Taken to its logical end, Bob's Gun Shop's argument would require us to strike down a demand letter requiring just one FFL to report to the Bureau "any portion" of record information as to one firearm. Although we would not hesitate to make such a ruling if we interpreted the plain language of the rider and the GCA to require it, we disagree with Bob's Gun Shop's reading of the rider.

The rider prohibits spending Bureau funds in relation to consolidating or centralizing records that FFLs are required to

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[15] Bob's Gun Shop included in its briefs considerable discussion of the legislative history of § 923(g)(5)(A) and § 926(a), which it claims shows that Congress intended to limit the use of demand letters to criminal investigations and to noncompliant FFLs. Because we find the statute unambiguous on its face, we do not resort to legislative history to determine what Congress intended its enactments to mean. We derive the meaning of the enactment solely from the plain meaning of the words Congress used. *See Faircloth v. Lundy Packing Co.*, 91 F.3d 648, 653 (4th Cir.1996) ("If the statutory language is clear and unambiguous, our inquiry ends there ...; we neither resort to an examination of the statute's legislative history nor apply the traditional rules of statutory construction.").

maintain. The plain meaning of consolidating or centralizing does not prohibit the mere collection of some limited information. Both consolidating and centralizing connote a large-scale enterprise relating to a substantial amount of information.[16] We need not in this case determine the minimum level of record reporting that would trigger the rider's prohibition. Instead, we hold that the Bureau's demand letter in this case--sent to fewer than one percent of all FFLs and requesting only a portion of record information statutorily required to be maintained[17] --does not constitute consolidating

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[16] Because we conclude that the meanings of consolidating and centralizing are unambiguous, we cannot resort to legislative history to determine the meaning of the words. *See Faircloth,* 91 F.3d at 653. We note, however, that our interpretation of the plain meaning of consolidating and centralizing is entirely consistent with the legislative history of the rider. The first of the annual appropriations riders was enacted in 1978 in response to the Bureau's proposed regulation that would have required every FFL to submit a quarterly report of all dispositions of firearms. *See* 43 Fed.Reg. 11,800-02 (Mar. 21, 1978); *RSM, Inc. v. Buckles,* 254 F.3d 61, 67 (4th Cir.2001). Thus, the legislative history also suggests that Congress intended to prohibit a large-scale enterprise to consolidate and centralize a substantial amount of FFL record information.

[17] The demand letter in this case requested less extensive record information than the Bureau's demand letter we upheld in *RSM.* In that case, the Bureau required the targeted FFLs to produce all their record information regarding all their firearm purchases and sales in the prior three years. *RSM,* 254 F.3d at 63.

In this case, the Bureau's demand letter limited the record request to secondhand firearms purchased in 1999. Rather than produce all the record information in their possession as to these specific firearms, the FFL dealers were instructed not to produce the names and addresses of the individuals from whom the secondhand firearms were acquired.

or centralizing record information.[18]

C.

[3] Bob's Gun Shop also argues that the Bureau's issuance of demand letters to FFLs who are otherwise in compliance with all record maintenance requirements is a new interpretation by the Bureau of its authority to issue demand letters. It contends that this new interpretation constitutes a new "rule" that violates 18 U.S.C. § 926(a). This argument has two primary flaws.

First, the Bureau's issuance of the demand letter to Bob's Gun Shop and the other similarly situated FFLs does not constitute the making of a new "rule." Bob's Gun Shop argues that the Bureau's demand letter constitutes a new "rule"[19]

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[18] We noted in *RSM* that our holding was limited to demand letters to noncompliant FFLs. *RSM*, 254 F.3d at 67. We were not confronted in *RSM* with the issue now before us--whether the Bureau is authorized to issue demand letters even when there is no allegation that the targeted FFL dealers have failed to comply with statutory record reporting obligations. We conclude that the Bureau's letter in this case-- to fewer than one percent of all FFLs which have not otherwise failed to comply with record reporting requirements--is authorized under § 923(g)(5)(A) and does not violate the appropriations riders' ban on consolidating and centralizing record information. Our analysis of the plain language of the GCA's statutory framework is entirely consistent with the judgment in *RSM*-- § 923(g)(5)(A) clearly allows the Bureau to issue demand letters to FFLs that have failed to comply with record reporting requirements.

[19] The Administrative Procedure Act (APA) defines "rule," in pertinent part, as:

> the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency.... 5 U.S.C. § 551(4). The Bureau's decision to send its demand letter to approximately one

prescribed in 2000 because the Bureau had never before interpreted its authority under § 478.126 to allow it to issue demand letters to FFLs that otherwise have fully complied with their record keeping requirements. It relies on a line of cases standing for the proposition that when "an agency has given its regulation a *definitive interpretation,* and later significantly revises that interpretation, the agency has in effect amended its rule, something it may not accomplish without notice and comment" under the APA. *See, e.g., Alaska Prof'l Hunters Ass'n v. Federal Aviation Admin.,* 177 F.3d 1030, 1034 (D.C.Cir.1999) (emphasis added).

Bob's Gun Shop has failed to show that the Bureau previously definitively interpreted § 478.126 as prohibiting it from issuing demand letters to compliant FFLs.[20] At most,

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percent of all FFLs does not constitute a "rule" as defined by the APA. We agree with the district court that the Bureau's action probably constitutes no more than an informal "adjudication," 5 U.S.C. § 551(7), ordering a discrete group of FFLs to produce select records relating to a specific type of firearm acquisition. *See Blaustein,* 220 F.Supp.2d at 543 n. 9.

[20] Bob's Gun Shop cites, among other documents, to a 1968 letter to Congress in which the Director indicated that the Bureau had no intention of using its demand letter authority to require law abiding gun dealers to report their firearm transactions. *See* 131 Cong. Rec. S9,101- 05 (1985). This letter does not rise to the level of establishing a definitive interpretation that would limit the Bureau's authority to issue demand letters only to noncompliant FFLs. The context of the letter makes clear that the Director's main concern was assuring Congress that the Bureau would not use the demand letter to establish a national registry of firearms of all FFLs. Instead, the Director envisioned issuing demand letters only to a small minority of FFLs suspected of illegal trafficking. The demand letter in this case is consistent in significant respect with the Director's 1968 letter. The letter was sent to an extremely small percentage of FFLs that accounted for a significant percentage of new firearms that ended up being recovered at

Bob's Gun Shop has shown that the demand letter in question is the first seeking information from compliant FFLs, which is far from establishing that the Bureau has now revised its prior, well- established interpretation that allowed demand letters only to noncompliant FFLs.

Second, even if we were to decide that the demand letter constituted a new "rule" prohibited by § 926(a), we would conclude that the Bureau acted within its statutory authority under § 923(g)(5)(A). This statutory provision, which grants the Bureau broad authority to issue demand letters seeking records from FFLs, was enacted at the same time as § 926(a). Section 926(a) prohibits a federal agency from prescribing new *rules or regulations* that require FFLs to report their records. Section 926(a) clearly does not (nor could it) limit Congress from enacting a statutory provision such as § 923(g)(5)(A) that requires FFLs to report their record information when directed by a demand letter issued by the Bureau.

D.

[4] Finally, Bob's Gun Shop argues that the Bureau's demand letter is arbitrary and capricious because it is based on irrational and inaccurate selection criteria. We disagree.

In its demand letter, the Bureau informed Bob's Gun Shop that it was selected to receive the letter because it had traced to it in 1999 ten crime guns with a time-to-crime of less than three years. The Bureau explained that its research had demonstrated that a high volume of gun traces with a short time-to-crime may indicate illegal firearms trafficking by an FFL dealer. It further noted that these indicators relating to the

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crime scenes or possessed by ineligible persons much sooner than normal.

new firearms sold by Bob's Gun Shop may also mean that Bob's Gun Shop is selling a high volume of second-hand firearms used in crime. The Bureau specifically recognized, however, that these indicators did not establish that Bob's Gun Shop had violated any gun control laws or regulations.

Bob's Gun Shop asserts that it is irrational to assume that just because a gun shop has ten or more new crime gun traces that it might also have a high volume of secondhand guns used in crimes. It also contends that the Bureau's assertion that Bob's Gun Shop had a high volume of crime gun traces in 1999 is misleading. Based on its sales of nearly 2000 firearms in 1999, Bob's Gun Shop asserts that ten traces is of no significance. Bob's Gun Shop further alleges that two of the ten firearms traced were traced because they were stolen from the individuals to whom Bob's Gun Shop sold them. Thus, these two particular traces negate any inference that Bob's Gun Shop or its customers were involved in diverting any new firearms into the illegal market.

[5][6] Determining whether an agency action is arbitrary and capricious is subject to a highly deferential standard of review that presumes the validity of the agency action. *Natural Res. Def. Council, Inc. v. United States Envtl. Prot. Agency,* 16 F.3d 1395, 1400 (4th Cir.1993). Under this standard, the reviewing court must carefully consider the agency's action to determine whether a rational basis exists for its decision. *Id.* at 1401; *see also Leather Indus. of Am., Inc. v. Environmental Prot. Agency,* 40 F.3d 392, 409 (D.C.Cir.1994) ("Where the agency's line-drawing does not appear irrational and the [challenger] has not shown that the consequences of the line-drawing are in any respect dire ... we will leave that line-drawing to the agency's discretion."). Although the court's review of the agency's decision must be

searching and careful, the court must not substitute its judgment for that of the agency. *Citizens to Preserve Overton Park, Inc. v. Volpe,* 401 U.S. 402, 416, 91 S.Ct. 814, 28 L.Ed.2d 136 (1971), *overruled on other grounds by Califano v. Sanders,* 430 U.S. 99, 105, 97 S.Ct. 980, 51 L.Ed.2d 192 (1977).

We conclude that the Bureau's decision to send demand letters to Bob's Gun Shop and the approximately 450 similarly situated FFLs was neither arbitrary nor capricious. The Bureau's research revealed that this small class of dealers--representing fewer than one percent of the more than 80,000 FFL dealers--accounted for a significant percentage of the new firearm traces performed in 1999. The Bureau did not make the unsubstantiated assumption that these dealers were illegally trafficking in firearms. Indeed, the Bureau was careful to inform these dealers that they were not being accused of any wrong- doing. Instead, the Bureau reasonably deduced that since this small group of dealers was the original source of a disproportionate share of the new firearms that were traced, this same group might also be the source--through illegal or legal means--of a substantial percentage of secondhand firearms that are traced. Although this assumption might ultimately be proved wrong, the Bureau did not act arbitrarily or capriciously in drawing such a conclusion.

V.

For the foregoing reasons, we hold that the Bureau's demand letter does not violate the GCA or any of its implementing regulations. We further conclude that the Bureau's criteria for choosing which dealers should receive the demand letters were not arbitrary or capricious. Thus, we affirm the judgment of the district court in favor of the Bureau.

AFFIRMED

United States District Court,
E.D. Virginia,
Norfolk Division.

BLAUSTEIN & REICH, INC., d/b/a Bob's Gun & Tackle Shop, Plaintiff,
v.
Bradley A. BUCKLES, Director, Bureau of Alcohol, Tobacco and Firearms,
Defendant.

No. Civ.A. 2:01CV875.

Sept. 17, 2002.

Richard E. Gardiner, Stephen Porter Halbrook, Fairfax, VA, for plaintiffs.

Lawrence Richard Leonard, Office of the U.S. Attorney, Norfolk, VA, Judry Laeb Subar, U.S. Department of Justice, Washington, DC, for defendants.

OPINION AND ORDER ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

MORGAN, District Judge.

PRELIMINARY STATEMENT

This matter comes before the Court on the Defendant's motion for summary judgment. The Court held a hearing on

the motion on August 14, 2002 and granted the motion for summary judgment from the bench. This Order sets forth more completely the Court's reasoning.

The Bureau of Alcohol, Tobacco and Firearms (ATF) has a statutory duty pursuant to the Gun Control Act of 1968(GCA), as amended[1], to trace firearms to keep them out of the hands of criminals, unauthorized juveniles, felons, and other prohibited persons, and to assist law enforcement officials in their efforts to reduce crime and violence. The ATF's statutory duty to trace guns is in tension, however, with the statutory prohibition that forbids the ATF from establishing a national firearms registry. The ATF accomplishes its gun trace function without a national registry by accessing where necessary records held on file by gun manufacturers, retail gun dealers, and others. In lieu of maintaining a centralized system of records in-house (e.g. a national gun registry), ATF requests specific records regarding an individual firearm from these entities in the context of each discrete gun trace. This system, as will be seen, is not without its limitations.

In February 2000, ATF prepared a report assessing the effectiveness of the Agency's gun tracing capability. BUREAU OF ALCOHOL, TOBACCO & FIREARMS, COMMERCE IN FIREARMS IN THE UNITED STATES (2000) [hereinafter COMMERCE IN FIREARMS]. Based on the findings in COMMERCE IN FIREARMS, ATF launched two new data collection efforts. It implemented these two data collection efforts by generating two different versions of "demand letters" to seek the type of information from gun dealers that would, according to the findings in COMMERCE IN FIREARMS, improve the effectiveness of the ATF gun tracing program.

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[1] Codified at 18 U.S.C. §§ 921-930.

The first version of the demand letter was challenged by a gun dealer in Maryland last year. The gun dealer prevailed at the District Court but the U.S. Court of Appeals for the Fourth Circuit reversed the District Court and ruled for the Government. *RSM v. Bureau of Alcohol, Tobacco and Firearms,* 254 F.3d 61 (2001). The second version of the demand letter gives rise to the case now before this Court on Defendant's Motion for Summary Judgment.

ATF's gun tracing capability under the GCA depends heavily on records maintained by the Federal Firearms Licensee (FFL). Bob's Guns, the Plaintiff, is an FFL because it is a retail gun dealer. Persons in the business of manufacturing, importing or dealing in firearms (or importing or manufacturing ammunition) are classified as FFLs and they must obtain a license from ATF (18 USC § 923(a)). As a condition of its license, each FFL must maintain records of importation, production, shipment, receipt, sale, or other disposition of firearms at its place of business for such period, and in such form, as ATF regulations prescribe (18 USC § 923(g)). So, when a gun is recovered from a crime scene or from the person of an individual who is forbidden access to guns (e.g. a felon or a juvenile), law enforcement officials oftentimes request a gun trace from ATF.

This crime gun trace process, and its limitations, are described in detail in COMMERCE IN FIREARMS at pages 19-20 & 22-27. ATF possesses records that identify the entity that manufactured the gun (or imported the gun into the country). In nearly all cases, however, ATF records do not identify the retail dealer, the first retail purchaser, nor any subsequent purchaser. ATF commences a gun trace by requesting from the manufacturer (or importer) the identity of the person or organization to whom the gun was delivered. If

the person or entity who received the gun from the manufacturer (or importer) is an FFL, then ATF can obtain disposition records for that gun on request. And so ATF gun tracking proceeds in daisy chain fashion through the distribution chain to the retail dealer. ATF then requests the dealer to examine its records to determine the identity of the first retail purchaser. The trail stops for ATF at the identity of the first retail purchaser because Federal law does not require unlicensed sellers to preserve transfer records, nor are gun owners required to keep a record of the serial number of their firearms or to report lost or stolen firearms. ATF therefore usually cannot trace a gun once the first retail purchaser sells the gun to another private party, or when the first retail purchaser loses the gun or has it stolen from him. This "secondhand sale" phenomenon creates a significant gap in the gun tracing system (including the possibility of multiple private party sales) that can make it difficult or impossible for ATF to trace the ownership of a gun.

The paper trail is re-established at least in part if a private party sells a gun to an FFL. The difficulty for ATF in this latter regard, however, is that ATF has no way of knowing that records of interest concerning a secondhand sale are on file at a particular FFL. There were in late 1999 some 100,000 or more FFLs at various locations around the nation. When attempting a gun trace following a secondhand sale, ATF has no way of knowing that one of these FFLs may have purchased the particular gun in question. There is no link in the records accessible to ATF between the first retail purchaser and the FFL who subsequently purchases a secondhand gun. This problem of the missing link means that the ATF gun tracing capability encounters serious limitations once a gun passes into private ownership.

COMMERCE IN FIREARMS evaluated the efficacy of the ATF gun tracing capability and gave rise to the new data collection effort challenged by Plaintiff in the instant case. ATF concluded that

> there is a subset of current dealers that have both a high volume of traces and for which more than half of those traces had a time to crime of less than three years. This particular indicator is a useful measure of the number of dealers whose guns move frequently and quickly end up in the wrong hands.

COMMERCE IN FIREARMS at 25.

ATF determined that Bob's Guns is one of the dealers with a high volume of crime gun traces and a short time to crime.[2]

On February 7, 2000, ATF sent a demand letter to Bob's Guns requiring Plaintiff to submit quarterly reports regarding secondhand guns obtained from non-FFLs. ATF required Bob's Guns to identify the manufacturer/importer, model of the firearm, caliber or gauge, and the serial number. ATF instructed the Plaintiff to forego submitting information about the individual from whom Bob's Guns acquired the secondhand gun or the individual to whom Bob's Guns transferred the secondhand gun. (Bob's Guns is obligated by the GCA as amended, however, to retain information regarding the seller's identity and the purchaser's identity on file and it is reasonable to expect that ATF would request that information in the context of a crime gun trace.) The purpose of this demand letter was to cure in part the ATF's "missing link" problem

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[2] Time to crime is the time it took for a crime gun to move from the retailer to a crime scene.

described above.

FINDINGS OF FACT[3]

In accordance with Local Rule 56(B)[4], the Court's Findings of Fact will be those set forth at pages 8-12 of the Defendant's Memorandum of Law in Support of Defendant's Motion for Summary Judgment. The Court adopts the Defendant's "Statement of Undisputed Facts" in whole because the Plaintiff's reply brief contained no specifically captioned section listing the material facts that it wished to dispute. The Plaintiff's noncompliance with the requirements set forth in Local Rule 56(B) triggers the consequence set forth in that rule, e.g. the facts identified by the Defendant as material facts as to which there is no genuine issue in its opening brief are admitted. These admitted facts are as follow:

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[3] This opinion views the facts in the light most favorable to the Plaintiff.

[4] Local Rule 56(B) provides as follows:
Summary Judgment--Listing of Undisputed Facts: Each brief in support of a motion for summary judgment shall include a specifically captioned section listing all material facts as to which the moving party contends there is no genuine issue and citing the parts of the record relied on to support the listed facts as alleged to be undisputed. A brief in response to such motion shall include a specifically captioned section listing all material facts as to which it is contended that there exists a genuine issue necessary to be litigated and citing the parts of the record relied on to support the facts alleged to be in dispute. In determining a motion for summary judgment, the Court may assume that facts identified by the moving party in its listing of material facts are admitted, unless such a fact is controverted in the statement of genuine issues filed in opposition to the motion.
U.S. District Court for the Eastern District of Virginia, Local Rules of Practice 56(B).

1. In a report issued in February 2000, ATF described how it has exercised its statutory authority to conduct gun traces from federally licensed firearms dealers. *See* COMMERCE IN FIREARMS, A.R. 38.[5]

2. A firearms trace may be initiated when a federal, state or local law enforcement officer recovers a firearm, and the officer's law enforcement agency requests that ATF's National Tracing Center conduct a trace. COMMERCE IN FIREARMS, A.R. 38. The Center then systematically tracks the movement of the firearm from its manufacturer or importer through the distribution chain to the first retail dealer, who is asked to identify the first retail purchaser. *Id.*, A.R. 39.

3. Federal firearms licensees fill a crucial role in ensuring the effective functioning of ATF's tracing system, a fact recognized by Congress when it required licensees to "respond immediately to, and in no event later than 24 hours after the receipt of" a request by ATF to trace a firearm in the course of a bona fide criminal investigation. 18 U.S.C. § 923(g)(7). *See also* 27 C.F.R. § 178.25a.

4. While firearms tracing can significantly aid law enforcement agencies in their efforts to solve crimes and detect trafficking patterns, the tracing system does have limitations. COMMERCE IN FIREARMS, A.R. 44-46.

5. One weakness in the tracing system involves uncooperative dealers. Traces can be conducted in a timely manner and be completed successfully only if FFLs keep proper records and cooperate with ATF trace requests. In 1999, approximately .1% of FFLs were either nonresponsive to a trace request, slow to respond on at least three occasions, or

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[5] References to "A.R. __" are to the Bates stamp page numbers of the administrative record.

gave incorrect information requiring a National Tracing Center recheck. A.R. 44. ATF sent such dealers (including the plaintiff in *RSM*) a letter essentially requiring them to provide their acquisition and disposition records from the past three years, including the names of gun purchasers, and to continue to provide this information monthly until advised otherwise. A.R. 9-14.

6. Another key weakness inherent in the system involves secondhand guns. Because federal law only requires federal firearms licensees to maintain transfer records, ATF's tracing system does not allow for ready tracing of firearm sales beyond the first retail sale of a gun. *Id.*, A.R. 44, 45. Therefore, ATF cannot readily conduct a trace of a gun that has been either sold by, or stolen from, the first retail purchaser. *Id.* The difficulty in tracing such guns is a major problem facing the law enforcement community because more than half of ATF's gun trafficking investigations involve secondhand firearms. *Id.*

7. The data necessary to conduct traces of many secondhand guns does exist, because the GCA requires licensed dealers to maintain records of secondhand guns they acquire from unlicensed persons. Prior to the institution of the demand program at issue in this case, however, a regular gun trace could not be conducted on the basis of this information because these records are not routinely provided to ATF. Moreover, because no link exists between first and subsequent retail transactions, there is no way to track the gun to that FFL to request such records. A.R. 45.

8. ATF has analyzed its gun trace data in an effort, among other things, to determine how best to obtain access to dealer information on secondhand firearms so that it can be used in tracing these firearms. While ATF's statutory authority discussed above requires any firearms licensee to provide

detailed and extensive record information when requested to do so by letter from ATF, the government has used available data to develop a program of narrowly-focused data collection, asking for limited information from a small group of dealers. A.R. 9-14.

9. ATF trace data indicates that most of the new firearms that are traced are sold by a small number of licensed dealers. COMMERCE IN FIREARMS,A.R. 42. In calendar year 1998, for example, just slightly more than one percent of all licensed dealers were associated with ten or more firearms traces. *Id.* Those dealers accounted for more than half of all of the traces made to retail dealers for that year. *Id.*

10. This small group of dealers can be further narrowed by using a statistic known as "time to crime," which "refers to the time that it took for the crime gun to move from the retailer to a crime scene." A.R. 7. The average "time to crime" is about six years from the first retail sale. *Id.*, A.R. 43-44. Therefore, three years is considered a short time to crime, and is considered an important trafficking indicator, suggesting rapid movement to the illegal gun market. *Id.* Thus, by identifying those dealers that have ten traces or more per year with a short time to crime of three years or less, ATF can obtain a sense of which dealers tend to sell guns that are ultimately used in crimes. *Id.*, A.R. 44.

11. The fact that a dealer sells a relatively large number of guns that someone else uses in a crime does not necessarily indicate any wrongful action on the part of that dealer. COMMERCE IN FIREARMS, A.R. 41-42. Nonetheless, because dealers that sell significant numbers of new guns that quickly become crime guns are likely also to sell a significant number of used guns that eventually are used in crime, having high trace rate/low "time to crime" dealers provide information

about guns that they purchase on the secondhand market will give ATF information that it needs to conduct traces of secondhand guns. Attachment to Memorandum from Director, ATF, to Secretary and Deputy Secretary of the Treasury (Feb. 4, 2000), A.R. 12-14.

12. In response to the findings in the 2000 report, ATF decided to issue "demand letters" requiring certain gun dealers to provide ATF with some of the information that they are obligated to keep about firearms transactions. *Id.*, A.R. 9-14. Dealers such as the plaintiff in *RSM,* that had been uncooperative in assisting ATF in conducting traces, were required to provide a fairly broad scope of data about all firearms acquired and disposed of during the preceding three years, including the names of the persons from whom guns were acquired and to whom they were sold. *Id.* Dealers like Plaintiff here, with ten or more short time to crime traces the previous year, were asked, in accordance with the same statutory and regulatory authority that was involved in *RSM,* to provide a much more limited subset of this information, consisting only of the names of the manufacturers or importers, the serial numbers, the models, and the calibers or gauges of secondhand guns that such dealers obtained the previous year from nonlicensees. *Id.* Dealers were specifically told not to provide the names of the individuals from whom they had received the guns or to whom they had sold them. In the demand letter, ATF explained the fact that the FFL had a high number of traces of new crime guns with a short time to crime may mean that the FFL is also selling a high volume of secondhand guns used in crime. The letter also explained that without the requested information, ATF would not be able to trace these secondhand guns because they have passed through the hands of one or more nonlicensed purchasers. The letter

required the FFLs to continue to submit this information on a quarterly basis until advised otherwise. *Id.*

13. ATF's records indicate that during calendar year 1999, Plaintiff was the first retail seller identified in ten traces involving guns with a time to crime of three years or less. A.R. 100-06. Therefore, ATF sent Plaintiff the demand letter being challenged here, asking for the limited information listed above for the secondhand guns taken into inventory by Plaintiff. A.R. 7-8.

14. Rather than complying with the demand letter, Plaintiff filed this lawsuit. Complaint, *passim.*

OPINION

District courts may enter summary judgment only when there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. *Miller v. Leathers*, 913 F.2d 1085, 1087 (4th Cir.1990). The facts and inferences drawn from the pleadings must be viewed in the light most favorable to the nonmoving party. *Nguyen v. CNA Corp.*, 44 F.3d 234, 237 (4th Cir.1995). Summary judgment is appropriate when the record, taken as a whole, could not lead a rational trier of fact to find for the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-49, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

In order to successfully defeat a motion for summary judgment, a nonmoving party cannot rely on "mere belief or conjecture, or the allegations and denials contained in his pleadings." *Doyle v. Sentry Insur.*, 877 F.Supp. 1002, 1005 (E.D.Va.1995) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 324, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986)). Rather, the nonmoving party must set forth specific facts through affidavits, depositions, interrogatories, or other evidence to

show genuine issues for trial. *Celotex,* 477 U.S. at 324, 106 S.Ct. 2548. When the nonmoving party fails to make a sufficient showing establishing an essential element of his case and he bears the burden of proof on that issue, "there is 'no genuine issue of material fact,' since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other fact immaterial." *Id.* at 322, 106 S.Ct. 2548. *Anderson,* 477 U.S. at 254, 106 S.Ct. 2505.

As noted in the preceding section of this Opinion and Order, there is no genuine issue as to those facts listed as 1 to 14, above. This Court must now determine if these admitted facts prevent the Plaintiff from establishing an essential element of its case.

Demand letters, such as the one that ATF sent to Bob's Guns, are expressly authorized by 18 USC § 923(g)(5)(A) which provides in pertinent part:

> Each licensee shall, when required by letter issued by the Secretary ... submit on a form specified by the Secretary, for periods and at the times specified in such letter, all record information required to be kept by this chapter or such lesser record information as the Secretary in such letter may specify.

Id.[6]

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[6] The Plaintiff relied upon legislative history to argue in its brief that § 923(g)(5)(A) forbids ATF from sending a demand letter to a law abiding gun dealer, such as Bob's Guns in the instant litigation. The Plaintiff argued that ATF may only send a demand letter to a dealer who has failed to comply with the GCA. The plain language of § 923(g)(5)(A), however, unambiguously commands that "each licensee" is subject to ATF's demand letter authority. The legislative history offered by the Plaintiff, therefore, will not be considered by the Court. *See, e.g., In re Equipment Services,*

However, as the U.S. Court of Appeals for the Fourth Circuit made clear in *RSM v. Bureau of Alcohol, Tobacco and Firearms*, 254 F.3d 61 (2001), the statutory authority conferred by 18 USC § 923(g)(5)(A) "does not grant BATF an unbounded delegation of authority to request record information". 254 F.3d at 66. The Fourth Circuit noted that ATF may not issue demand letters for "any purpose". *Id.* at 67. The Fourth Circuit also stated that ATF may not "issue limitless demand letters under section 923(g)(5)(A) in a backdoor effort to avoid section 926(a)'s protections for law-abiding firearms owners". *Id.* at 67. Likewise, the Fourth Circuit stated that ATF could not use demand letters "to establish a national firearms registry." *Id.* The Court approved of the demand letter at issue in *RSM* because it sought information from a narrow universe of FFLs which rendered the data developed by the demand letter in that case "a very far cry from the creation of a national firearms directory". *Id.* at 68.

With the contours for the authority conferred by 18 USC § 923(g)(5)(A) thus defined, this Court must now decide whether ATF may require compliance with the demand letter the agency issued to the Plaintiff.

Plaintiff argued in its Opposition Brief that the demand letter is improper for the following five[7] reasons: (1) It violates 18 USC § 923(g)(7) because the demand letter is not linked to

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Inc., 290 F.3d 739, 745 (4th Cir.2002) ("When a statute is unambiguous, canons of construction prevent [a court] from considering outside sources, such as legislative history, to attempt to discern what Congress may or may not have intended to do.").

[7] At oral argument the Plaintiff advanced three of these rationales, omitting from its presentation the arguments founded on 18 USC § 923(g)(7) and on the appropriations rider.

a bona fide criminal investigation; (2) It violates 18 USC § 926(a) because the demand letter is a "rule or regulation prescribed after the date of the enactment of the Firearms Owners' Protection Act [May 19, 1986]" and it requires the FFLs records to be recorded or transferred to a facility of the United States; (3) It violates 18 USC § 926(a) because the demand letter gives ATF information the agency is using to create a system of firearms registration; (4) The demand letter violates the language in an appropriations rider that forbids ATF from using appropriated funds to centralize FFLs records of acquisition and disposition of firearms; and, (5) The demand letter violates the Administrative Procedures Act because it is arbitrary and capricious.

1. Is the demand letter illegal because it lacks connection to a criminal investigation?

[1] Plaintiff builds its argument that the demand letter must have links to a bona fide criminal investigation in reliance on 18 USC § 923(g)(7) which reads in pertinent part as follows:

> Each licensee shall respond immediately to, and in no event later than 24 hours after the receipt of, a request by the Secretary for information contained in records required to be kept by this chapter as may be required for determining the disposition of 1 or more firearms in the course of a bona fide criminal investigation.

The problem with the Plaintiff's argument is that 18 USC § 923(g)(7) is a statutory provision obligating FFLs to respond quickly to certain types of ATF requests; it in no way limits the types of requests that ATF can levy on FFLs. For this reason, 18 USC § 923(g)(7) bears no relation to ATF's power to issue demand letters pursuant to 18 USC § 923(g)(5)(A).

RSM v. Bureau of Alcohol, Tobacco and Firearms, 254 F.3d 61, 66 (4th Cir.2001).[8]

2. Does the demand letter violate 18 USC § 926(a) which prohibits ATF from creating "new rules" that require data from FFL records to be transferred to a facility of the United States after May 19, 1986?

The Plaintiff's argument challenging the demand letter relies on the passage in 18 U.S.C. § 926(a) which reads, in pertinent part, as follows:

No such rule or regulation prescribed after the date of the enactment of the Firearms Owners' Protection Act [enacted May 19, 1986] may require that records required to be maintained under this chapter or any portion of the contents of such records, be recorded at or transferred to a facility owned, managed, or controlled by the United States....

Id.

[2] The Plaintiff's argument has several difficulties. The "new rule" prohibition in 18 U.S.C. § 926(a) was enacted in 1986 in the same legislation that codified the ATF "demand letter" authority in § 923(g)(5)(A). It is illogical to think that Congress in 1986 conferred on ATF the statutory authority to issue demand letters while, in the same legislation, Congress barred ATF from using it. *See, U.S. v. Fisher,* 58 F.3d 96, 99 (4th Cir.1995), *cert. denied,* 516 U.S. 927, 116 S.Ct. 329, 133 L.Ed.2d 229 ("rules of statutory construction require that [a court] give meaning to all statutory provisions"). Even if the

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[8] The Plaintiff sought to distinguish *RSM* because the gun dealer in that case was in violation of the GCA while the gun dealer in the case at bar is in compliance with the law. The Court believes the Plaintiff reads *RSM* too narrowly. Many, if not all, of the principles regarding the scope of the ATF's § 923(g)(5)(A) authority set forth by the Fourth Circuit in *RSM* would apply to FFLs whether they are in or out of compliance with the GCA.

"new rule" prohibition in 18 U.S.C. § 926(a) somehow did apply, it would not apply here because the demand letter is not a "rule or regulation".[9] The demand letter was issued pursuant to the statutory authority found at 18 USC § 923(g)(5)(A) which, like the demand letter itself, is not a "rule or regulation". Hence the "new rule" prohibition in 18 U.S.C. § 926(a) is inapplicable to the demand letter that ATF issued to Bob's Guns. *See* 254 F.3d at 66. Even if the Plaintiff could establish

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[9] The demand letter is the product of an adjudication, likely an informal adjudication, but it is not a rule. *See, Yesler Terrace Community Council v. Cisneros,* 37 F.3d 442, 448 n. 5 (9th Cir.1994) ("An adjudication (which results in an order) is virtually any agency action that is not rulemaking."); *City of West Chicago v. U.S. Nuclear Regulatory Commission,* 701 F.2d 632, 644 (7th Cir.1983) ("Informal adjudications constitute a residual category including 'all agency actions that are not rulemaking and that need not be conducted through on the record hearings.' ") One key criterion upon which courts rely when determining whether a given agency action is a rule or an adjudication is that a rule produces a decision which is of general application and affects the rights of broad classes of unspecified individuals. *Motion Picture Ass'n of America v. Oman,* 969 F.2d 1154, 1157 (D.C.Cir.1992); *see also, Yesler Terrace Community Council v. Cisneros,* 37 F.3d 442, 448 n. 5 (9th Cir.1994). Conversely, an adjudication occurs when agency action affects specific individuals in specific cases. *American Airlines v. Dept. of Transportation,* 202 F.3d 788, 798 (5th Cir.2000), *cert. denied,* 530 U.S. 1274, 120 S.Ct. 2740, 147 L.Ed.2d 1005; *Yesler Terrace Community Council v. Cisneros,* 37 F.3d 442, 448 n. 5 (9th Cir.1994); *Motion Picture Ass'n of America v. Oman,* 969 F.2d 1154, 1157 (D.C.Cir.1992). Another point of distinction between a rule and an adjudication is that a rule is prospective and has a definitive effect on individuals only after the rule is subsequently applied. *Hercules v. EPA,* 598 F.2d 91, 117 (D.C.Cir.1978); *Yesler Terrace Community Council v. Cisneros,* 37 F.3d 442, 448 n. 5 (9th Cir.1994). The demand letter in the instant case cannot be a "rule" because it affects a specific individual (i.e. the Plaintiff), as opposed to a broad class of individuals. Another indication that the demand letter is not a "rule" is that the demand letter is of immediate effect, as opposed to prospective effect.

a linkage between the demand letter and a "rule or regulation", the pertinent rule or regulation can only be the one found at 27 C.F.R. § 178.126 which was prescribed in 1968, nearly twenty years before the cutoff date of 1986 set by Congress. *Id.* For these reasons, the demand letter at issue in the instant case is not proscribed by the "new rule" prohibition found in 18 USC § 926(a).

3. Is the demand letter illegal because it violates the 18 USC § 926(a) prohibition on creation of a system of firearms registration?

18 USC § 926(a) contains a clear prohibition regarding the establishment of "any system of registration of firearms, firearms owners, or firearms transactions or dispositions". As the U.S. Court of Appeals for the Fourth Circuit made clear in *RSM,* ATF must steer well clear of this prohibition. 254 F.3d at 67.

The Fourth Circuit approved of the demand letter at issue in *RSM* because it sought information from a narrow universe of FFLs which rendered the data developed by the demand letter in that case "a very far cry from the creation of a national firearms directory". 254 F.3d at 68. In the instant case the scope of ATF's effort to collect information about secondhand gun sales from a discrete group of dealers including Plaintiff is also limited. In the most important respects, the demand letter issued to the Plaintiff is even narrower than the data collection that was challenged in *RSM.* Here, the ATF demand letter has been sent to those few FFLs with two specific traits (high trace rate/low time to crime). *See* Material Facts Not in Dispute 8-10. The number of FFLs who received the type of demand letter at issue in the instant case is less than 1% of all FFLs nationwide. *Id.* Moreover, the amount of information required of the Plaintiff in the instant case is

relatively small, as compared to the amount of information that was required from the FFL in the *RSM* case. *See* Material Fact Not in Dispute 12. In *RSM,* the Fourth Circuit approved of a demand letter that required information concerning all firearms sales and purchases. 254 F.3d at 63. In the instant case, ATF has required the Plaintiff to submit information pertaining to the purchase and sale of secondhand guns, but not the purchase and sale of new guns. *See* Material Fact Not in Dispute 12. In *RSM,* the Fourth Circuit approved of a demand letter that required the FFL in that case to provide a wide range of information, including the purchasers' names. 254 F.3d at 63. In the case at bar, ATF has instructed the Plaintiff that it should not "include the name or other identifying information about either the individual from whom you acquired a secondhand gun or the individual to whom you transferred such a firearm".[10] *See* Material Fact Not in Dispute 12.

[3] Because the demand letter in the instant case seeks to obtain less information than was sought in RSM, and because the demand letter in the instant case has been served on a very small minority of FFLs nationwide, the information being gathered by ATF is "a very far cry from the creation of a national firearms directory". 254 F.3d at 68. For these reasons, and because the data collection effort is directly linked to ATF's responsibility to conduct firearms traces, the demand letter does not violate the 18 USC § 926(a) prohibition regarding the establishment of "any system of registration of firearms, firearms owners, or firearms transactions or dispositions".

4. Is the demand letter illegal because it violates the

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[10] Without the purchasers' and sellers' names ATF cannot use the data generated by this demand letter to create a national registry of firearms owners.

language in an appropriations rider that forbids ATF from using appropriated funds to centralize FFLs records of acquisition and disposition of firearms?

Since 1978, Congress has included a provision in ATF's annual appropriations legislation that prohibits the agency from spending money "in connection with consolidating or centralizing, within the Department of the Treasury, the records, or any portion thereof, of acquisition and disposition of firearms maintained by Federal firearms licensees." Pub.L. No. 106-554, 114 Stat. 2763 (2000).[11] Plaintiff argues that the rider prohibits ATF from issuing the demand letter at issue in this case. In *RSM,* however, the Fourth Circuit rejected just such a construction of that very rider.

The Fourth Circuit's *RSM* decision held that to read the appropriations rider as preventing ATF from effecting any collection of the records that firearms dealers are statutorily required to maintain would render inoperative several amendments to the Gun Control Act enacted after the rider was first adopted, including section 923(g)(5)(A). 254 F.3d at 68. Such a view of the statute, the Court said, would violate the basic rule of statutory construction that requires a statute to be interpreted so as to give it meaning. *Id.* Rather, the Court noted that the rider had its origins in Congressional concern about ATF's attempt to collect all the sales records of all FFLs and the accompanying invasion of lawful firearms owners' privacy, *id.* at 67, and held it to be inapplicable to a data collection effort by ATF that is narrow and that is linked to ATF's responsibility to conduct firearms traces. *Id.* at 68.

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[11] This is the citation for the restriction referenced in Plaintiff's complaint. However, as stated above, the restriction has been included in ATF's appropriations since 1978.

[4] For the reasons set forth previously in this Opinion, the Court is persuaded that the scope of ATF's effort to collect information about secondhand gun sales from a discrete group of dealers including Plaintiff is also limited; and in the most important respects, is even narrower than the data collection that was challenged in *RSM*. Likewise the Court concludes that the demand letter issued to Plaintiff in the instant case is directly linked to ATF's responsibility to conduct firearms traces. Therefore, because the demand letter was sent in order to assist ATF in fulfilling its statutory responsibility to assist law enforcement and to fight crime and violence, and in light of the limited reach of the letter, the appropriations restriction has no greater impact on the legitimacy of the demand letter at issue in this case than it did on the letter discussed in *RSM*.

5. Is the demand letter illegal because BATF's decision making was "arbitrary and capricious" in violation of the Administrative Procedures Act?

Demand letters are expressly authorized by the statute at 18 USC § 923(g)(5)(A). ATF, through submission of its Administrative Record has offered a well conceived rationale for the issuance of this particular demand letter. The material facts not in dispute, and the inferences therefrom viewed in the light most favorable to the Plaintiff, demonstrate that the ATF has, in the issuance of the demand letter to Plaintiff, made sound use of the statutory authority conferred on the agency by 18 USC § 923(g)(5)(A).

Each of the fourteen facts listed in this opinion are well supported in the Administrative Record. Plaintiff argued at the hearing that it should be permitted to supplement the Administrative Record. But, "review of agency action is limited to the administrative record before the agency when it makes its decision. *See Camp v. Pitts,* 411 U.S. 138, 142, 93

S.Ct. 1241, 36 L.Ed.2d 106 (1973)." *Trinity American Corp. v. U.S.E.P.A.*, 150 F.3d 389, 401 n. 4 (4th Cir.1998). Even if Plaintiff could show that it is entitled to supplement the Administrative Record (which it cannot) Plaintiff proffered none of the supplementary evidence with its reply brief or at oral argument. Instead, Plaintiff argued at the hearing that the evidentiary materials it wished the Court to consider were in Defendant's possession and were the subject of a pending motion to compel. *See,* Transcript of Proceedings at 20. Accordingly, Plaintiff argued, it should be permitted additional discovery prior to the Court taking action on the Defendant's summary judgment motion. The Court notes, however, that FRCP 56(f) requires that a party who wishes to delay summary judgment must support its argument for delay by submitting affidavits to the Court. *See, Nguyen v. CNA Corp.*, 44 F.3d 234, 242 (4th Cir.1995). This the Plaintiff has not done and, for this reason, the Court will not grant a continuance or other delay to allow Plaintiff to conduct additional discovery prior to the Court ruling on the Defendant's motion for summary judgment.

Having established that the case will be decided on the Administrative Record, the standard of review will be that set forth in the Administrative Procedure Act. *See* 5 U.S.C. § 706(2)(A). The Act "requires [a court] to uphold an agency action unless the action was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *1000 Friends of Maryland v. Browner,* 265 F.3d 216, 229 (4th Cir.2001). "The scope of review under the 'arbitrary and capricious' standard is narrow and a court is not to substitute its judgment for that of the agency." Motor Vehicle Mfrs. Ass'n of the United States v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43, 103 S.Ct. 2856, 77 L.Ed.2d 443 (1983). Rather,

the court is to "consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Citizens to Preserve Overton Park v. Volpe,* 401 U.S. 402, 416, 91 S.Ct. 814, 28 L.Ed.2d 136 (1971).

Agency action is deemed arbitrary and capricious "if the agency relied on factors that Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Hughes River Watershed v. Johnson,* 165 F.3d 283, 287-88 (4th Cir.1999). Clear error can be found in an agency decision " 'only if the error is so clear as to deprive the agency's decision of a rational basis.' *Wawszkiewicz v. Dep't of Transportation,* 670 F.2d 296, 301 (D.C.Cir.1981) (internal quotation omitted)." *Inova Alexandria Hospital v. Shalala,* 244 F.3d 342, 351 (4th Cir.2001).

When it comes to particular line-drawing decisions made in the course of setting policy, an agency "is not required to identify the optimal threshold with pinpoint precision. It is only required to identify the standard and explain its relationship to the underlying regulatory concerns." *WorldCom, Inc. v. F.C.C.,* 238 F.3d 449, 461-62 (D.C.Cir.2001). *See Sinclair Broadcast Group, Inc. v. F.C.C.,* 284 F.3d 148, 159 (D.C.Cir.2002) ("Where issues involve 'elusive' and 'not easily defined' areas ... [judicial] review is considerably more deferential, according broad leeway to the Commission's line-drawing determinations.").

[5] The decision by ATF to send demand letters to dealers that had ten or more crime guns with a "time to crime" of three years or less traced to them in a calendar year was not

arbitrary and capricious. As the Administrative Record amply shows, ATF in the instant case carefully screened the nationwide pool of FFLs to identify those few for whom issuance of the demand letter would yield the greatest law enforcement benefit. Similarly, ATF's conclusion that Plaintiff crossed the threshold for issuance of the demand letter under the applicable criteria is well supported by the Administrative Record. The record provided to this Court amply supports the conclusion that ATF reached reasonable conclusions in this regard, basing its decision-making on entirely appropriate factors. Especially in light of the degree of deference due the agency here[12], Plaintiff's argument that ATF acted arbitrarily and capriciously is wholly without merit.

CONCLUSION

For the above stated reasons, Defendant's motion for summary judgment is **GRANTED.** Accordingly the Court **ENTERS SUMMARY JUDGMENT** in favor of the Defendant.

The Clerk is **REQUESTED** to send a copy of this Order to all counsel of record.

It is so **ORDERED.**

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[12] In the last major gun rights litigation to reach the Fourth Circuit that Court held that ATF in the administration of the Gun Control Act enjoys the "deference generally due an agency charged by Congress with implementing its directives". *National Rifle Ass'n v. Brady,* 914 F.2d 475, 479 (4th Cir.1990).

United States Court of Appeals
for the Fourth Circuit

FILED

June 28, 2004

No. 02-2329
CA-01-875-2

BLAUSTEIN & REICH, INCORPORATED, d/b/a Bob's Gun & Tackle Shop

Plaintiff - Appellant

v.

BRADLEY A. BUCKLES, Director, Bureau of Alcohol, Tobacco, Firearms, and Explosives

Defendant - Appellee

On Petition for Rehearing and Rehearing En Banc

The appellant's petition for rehearing and rehearing en banc was submitted to this court. As no member of this Court or the panel requested a poll on the petition for rehearing en banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and rehearing en banc is denied.

Entered for a panel comprised of Judge Wilkins, Judge Niemeyer, and Judge Shedd.

For the court,

/s/ Patricia S. Connor

CLERK

STATUTES

18 U.S.C. § 923. Licensing

(a) No person shall engage in the business of importing, manufacturing, or dealing in firearms, or importing or manufacturing ammunition, until he has filed an application with and received a license to do so from the Attorney General. The application shall be in such form and contain only that information necessary to determine eligibility for licensing as the Attorney General shall by regulation prescribe and shall include a photograph and fingerprints of the applicant. Each applicant shall pay a fee for obtaining such a license, a separate fee being required for each place in which the applicant is to do business, as follows:

(1) If the applicant is a manufacturer --

(A) of destructive devices, ammunition for destructive devices or armor piercing ammunition, a fee of $1,000 per year;

(B) of firearms other than destructive devices, a fee of $50 per year; or

(C) of ammunition for firearms, other than ammunition for destructive devices or armor piercing ammunition, a fee of $10 per year.

(2) If the applicant is an importer --

(A) of destructive devices, ammunition for destructive devices or armor piercing ammunition, a fee of $1,000 per year; or

(B) of firearms other than destructive devices or ammunition for firearms other than destructive devices, or ammunition other than

armor piercing ammunition, a fee of $50 per year.

(3) If the applicant is a dealer --

(A) in destructive devices or ammunition for destructive devices, a fee of $1,000 per year; or

(B) who is not a dealer in destructive devices, a fee of $200 for 3 years, except that the fee for renewal of a valid license shall be $90 for 3 years.

[(C) Repealed. Pub.L. 103-159, Title III, § 303(4), Nov. 30, 1993, 107 Stat. 1546.]

(b) Any person desiring to be licensed as a collector shall file an application for such license with the Attorney General. The application shall be in such form and contain only that information necessary to determine eligibility as the Attorney General shall by regulation prescribe. The fee for such license shall be $10 per year. Any license granted under this subsection shall only apply to transactions in curios and relics.

(c) Upon the filing of a proper application and payment of the prescribed fee, the Attorney General shall issue to a qualified applicant the appropriate license which, subject to the provisions of this chapter and other applicable provisions of law, shall entitle the licensee to transport, ship, and receive firearms and ammunition covered by such license in interstate or foreign commerce during the period stated in the license. Nothing in this chapter shall be construed to prohibit a licensed manufacturer, importer, or dealer from maintaining and disposing of a personal collection of firearms, subject only to such restrictions as apply in this chapter to dispositions by a

person other than a licensed manufacturer, importer, or dealer. If any firearm is so disposed of by a licensee within one year after its transfer from his business inventory into such licensee's personal collection or if such disposition or any other acquisition is made for the purpose of willfully evading the restrictions placed upon licensees by this chapter, then such firearm shall be deemed part of such licensee's business inventory, except that any licensed manufacturer, importer, or dealer who has maintained a firearm as part of a personal collection for one year and who sells or otherwise disposes of such firearm shall record the description of the firearm in a bound volume, containing the name and place of residence and date of birth of the transferee if the transferee is an individual, or the identity and principal and local places of business of the transferee if the transferee is a corporation or other business entity: Provided, That no other recordkeeping shall be required.

(d)(1) Any application submitted under subsection (a) or (b) of this section shall be approved if --

(A) the applicant is twenty-one years of age or over;

(B) the applicant (including, in the case of a corporation, partnership, or association, any individual possessing, directly or indirectly, the power to direct or cause the direction of the management and policies of the corporation, partnership, or association) is not prohibited from transporting, shipping, or receiving firearms or ammunition in interstate or foreign commerce under section 922(g) and (n) of this chapter;

(C) the applicant has not willfully violated any of the provisions of this chapter or regulations issued thereunder;

(D) the applicant has not willfully failed to disclose any material information required, or has not made any false statement as to any material fact, in connection with his application;

(E) the applicant has in a State (i) premises from which he conducts business subject to license under this chapter or from which he intends to conduct such business within a reasonable period of time, or (ii) in the case of a collector, premises from which he conducts his collecting subject to license under this chapter or from which he intends to conduct such collecting within a reasonable period of time; and

(F) the applicant certifies that --

(i) the business to be conducted under the license is not prohibited by State or local law in the place where the licensed premise is located;

(ii)(I) within 30 days after the application is approved the business will comply with the requirements of State and local law applicable to the conduct of the business; and

(II) the business will not be conducted under the license until the requirements of State and local law applicable to the business have been met; and

(iii) that the applicant has sent or delivered a form to be prescribed by the Attorney General, to the chief law enforcement officer of the locality in which the premises are located, which indicates that the applicant intends to apply for a Federal firearms license.

(2) The Attorney General must approve or deny an application for a license within the 60-day period beginning on

the date it is received. If the Attorney General fails to act within such period, the applicant may file an action under section 1361 of title 28 to compel the Attorney General to act. If the Attorney General approves an applicant's application, such applicant shall be issued a license upon the payment of the prescribed fee.

(e) The Attorney General may, after notice and opportunity for hearing, revoke any license issued under this section if the holder of such license has willfully violated any provision of this chapter or any rule or regulation prescribed by the Attorney General under this chapter. The Attorney General may, after notice and opportunity for hearing, revoke the license of a dealer who willfully transfers armor piercing ammunition. The Attorney General's action under this subsection may be reviewed only as provided in subsection (f) of this section.

(f)(1) Any person whose application for a license is denied and any holder of a license which is revoked shall receive a written notice from the Attorney General stating specifically the grounds upon which the application was denied or upon which the license was revoked. Any notice of a revocation of a license shall be given to the holder of such license before the effective date of the revocation.

(2) If the Attorney General denies an application for, or revokes, a license, he shall, upon request by the aggrieved party, promptly hold a hearing to review his denial or revocation. In the case of a revocation of a license, the Attorney General shall upon the request of the holder of the license stay the effective date of the revocation. A hearing held under this

paragraph shall be held at a location convenient to the aggrieved party.

(3) If after a hearing held under paragraph (2) the Attorney General decides not to reverse his decision to deny an application or revoke a license, the Attorney General shall give notice of his decision to the aggrieved party. The aggrieved party may at any time within sixty days after the date notice was given under this paragraph file a petition with the United States district court for the district in which he resides or has his principal place of business for a de novo judicial review of such denial or revocation. In a proceeding conducted under this subsection, the court may consider any evidence submitted by the parties to the proceeding whether or not such evidence was considered at the hearing held under paragraph (2). If the court decides that the Attorney General was not authorized to deny the application or to revoke the license, the court shall order the Attorney General to take such action as may be necessary to comply with the judgment of the court.

(4) If criminal proceedings are instituted against a licensee alleging any violation of this chapter or of rules or regulations prescribed under this chapter, and the licensee is acquitted of such charges, or such proceedings are terminated, other than upon motion of the Government before trial upon such charges, the Attorney General shall be absolutely barred from denying or revoking any license granted under this chapter where such denial or revocation is based in whole or in part on the facts which form the basis of such criminal charges. No proceedings for the revocation of a license shall be instituted by the Attorney General more than one year after the filing of the indictment or information.

(g)(1)(A) Each licensed importer, licensed manufacturer, and licensed dealer shall maintain such records of importation, production, shipment, receipt, sale, or other disposition of firearms at his place of business for such period, and in such form, as the Attorney General may by regulations prescribe. Such importers, manufacturers, and dealers shall not be required to submit to the Attorney General reports and information with respect to such records and the contents thereof, except as expressly required by this section. The Attorney General, when he has reasonable cause to believe a violation of this chapter has occurred and that evidence thereof may be found on such premises, may, upon demonstrating such cause before a Federal magistrate and securing from such magistrate a warrant authorizing entry, enter during business hours the premises (including places of storage) of any licensed firearms importer, licensed manufacturer, licensed dealer, licensed collector, or any licensed importer or manufacturer of ammunition, for the purpose of inspecting or examining --

(i) any records or documents required to be kept by such licensed importer, licensed manufacturer, licensed dealer, or licensed collector under this chapter or rules or regulations under this chapter, and

(ii) any firearms or ammunition kept or stored by such licensed importer, licensed manufacturer, licensed dealer, or licensed collector, at such premises.

(B) The Attorney General may inspect or examine the inventory and records of a licensed importer, licensed manufacturer, or licensed dealer without such reasonable cause or warrant --

(i) in the course of a reasonable inquiry during the course of a criminal investigation of a person or persons other than the licensee;

(ii) for ensuring compliance with the record keeping requirements of this chapter --

(I) not more than once during any 12-month period; or

(II) at any time with respect to records relating to a firearm involved in a criminal investigation that is traced to the licensee.

(iii) when such inspection or examination may be required for determining the disposition of one or more particular firearms in the course of a bona fide criminal investigation.

(C) The Attorney General may inspect the inventory and records of a licensed collector without such reasonable cause or warrant --

(i) for ensuring compliance with the record keeping requirements of this chapter not more than once during any twelve-month period; or

(ii) when such inspection or examination may be required for determining the disposition of one or more particular firearms in the course of a bona fide criminal investigation.

(D) At the election of a licensed collector, the annual inspection of records and inventory permitted under this paragraph shall be performed at the office of the Attorney General designated for such inspections which is located in closest proximity to the premises where the inventory and records of such licensed collector are maintained. The inspection and examination authorized by this paragraph shall not be construed as authorizing the Attorney General to seize any records or other documents other than those records or documents constituting material evidence of a violation of law.

If the Attorney General seizes such records or documents, copies shall be provided the licensee within a reasonable time. The Attorney General may make available to any Federal, State, or local law enforcement agency any information which he may obtain by reason of this chapter with respect to the identification of persons prohibited from purchasing or receiving firearms or ammunition who have purchased or received firearms or ammunition, together with a description of such firearms or ammunition, and he may provide information to the extent such information may be contained in the records required to be maintained by this chapter, when so requested by any Federal, State, or local law enforcement agency.

(2) Each licensed collector shall maintain in a bound volume the nature of which the Attorney General may by regulations prescribe, records of the receipt, sale, or other disposition of firearms. Such records shall include the name and address of any person to whom the collector sells or otherwise disposes of a firearm. Such collector shall not be required to submit to the Attorney General reports and information with respect to such records and the contents thereof, except as expressly required by this section.

(3)(A) Each licensee shall prepare a report of multiple sales or other dispositions whenever the licensee sells or otherwise disposes of, at one time or during any five consecutive business days, two or more pistols, or revolvers, or any combination of pistols and revolvers totaling two or more, to an unlicensed person. The report shall be prepared on a form specified by the Attorney General and forwarded to the office specified thereon and to the department of State police or State law enforcement agency of the State or local law enforcement

agency of the local jurisdiction in which the sale or other disposition took place, not later than the close of business on the day that the multiple sale or other disposition occurs.

(B) Except in the case of forms and contents thereof regarding a purchaser who is prohibited by subsection (g) or (n) of section 922 of this title from receipt of a firearm, the department of State police or State law enforcement agency or local law enforcement agency of the local jurisdiction shall not disclose any such form or the contents thereof to any person or entity, and shall destroy each such form and any record of the contents thereof no more than 20 days from the date such form is received. No later than the date that is 6 months after the effective date of this subparagraph, and at the end of each 6-month period thereafter, the department of State police or State law enforcement agency or local law enforcement agency of the local jurisdiction shall certify to the Attorney General of the United States that no disclosure contrary to this subparagraph has been made and that all forms and any record of the contents thereof have been destroyed as provided in this subparagraph.

(4) Where a firearms or ammunition business is discontinued and succeeded by a new licensee, the records required to be kept by this chapter shall appropriately reflect such facts and shall be delivered to the successor. Where discontinuance of the business is absolute, such records shall be delivered within thirty days after the business discontinuance to the Attorney General. However, where State law or local ordinance requires the delivery of records to other responsible authority, the Attorney General may arrange for the delivery of such records to such other responsible authority.

(5)(A) Each licensee shall, when required by letter issued by the Attorney General, and until notified to the contrary in writing by the Attorney General, submit on a form specified by the Attorney General, for periods and at the times specified in such letter, all record information required to be kept by this chapter or such lesser record information as the Attorney General in such letter may specify.

(B) The Attorney General may authorize such record information to be submitted in a manner other than that prescribed in subparagraph (A) of this paragraph when it is shown by a licensee that an alternate method of reporting is reasonably necessary and will not unduly hinder the effective administration of this chapter. A licensee may use an alternate method of reporting if the licensee describes the proposed alternate method of reporting and the need therefor in a letter application submitted to the Attorney General, and the Attorney General approves such alternate method of reporting.

(6) Each licensee shall report the theft or loss of a firearm from the licensee's inventory or collection, within 48 hours after the theft or loss is discovered, to the Attorney General and to the appropriate local authorities.

(7) Each licensee shall respond immediately to, and in no event later than 24 hours after the receipt of, a request by the Attorney General for information contained in the records required to be kept by this chapter as may be required for determining the disposition of 1 or more firearms in the course of a bona fide criminal investigation. The requested information shall be provided orally or in writing, as the Attorney General may require. The Attorney General shall

implement a system whereby the licensee can positively identify and establish that an individual requesting information via telephone is employed by and authorized by the agency to request such information.

(h) Licenses issued under the provisions of subsection (c) of this section shall be kept posted and kept available for inspection on the premises covered by the license.

(i) Licensed importers and licensed manufacturers shall identify, by means of a serial number engraved or cast on the receiver or frame of the weapon, in such manner as the Attorney General shall by regulations prescribe, each firearm imported or manufactured by such importer or manufacturer. The serial number of any semiautomatic assault weapon manufactured after the date of the enactment of this sentence shall clearly show the date on which the weapon was manufactured. A large capacity ammunition feeding device manufactured after the date of the enactment of this sentence shall be identified by a serial number that clearly shows that the device was manufactured or imported after the effective date of this subsection, and such other identification as the Attorney General may by regulation prescribe.

(j) A licensed importer, licensed manufacturer, or licensed dealer may, under rules or regulations prescribed by the Attorney General, conduct business temporarily at a location other than the location specified on the license if such temporary location is the location for a gun show or event sponsored by any national, State, or local organization, or any affiliate of any such organization devoted to the collection, competitive use, or other sporting use of firearms in the

community, and such location is in the State which is specified on the license. Records of receipt and disposition of firearms transactions conducted at such temporary location shall include the location of the sale or other disposition and shall be entered in the permanent records of the licensee and retained on the location specified on the license. Nothing in this subsection shall authorize any licensee to conduct business in or from any motorized or towed vehicle. Notwithstanding the provisions of subsection (a) of this section, a separate fee shall not be required of a licensee with respect to business conducted under this subsection. Any inspection or examination of inventory or records under this chapter by the Attorney General at such temporary location shall be limited to inventory consisting of, or records relating to, firearms held or disposed at such temporary location. Nothing in this subsection shall be construed to authorize the Attorney General to inspect or examine the inventory or records of a licensed importer, licensed manufacturer, or licensed dealer at any location other than the location specified on the license. Nothing in this subsection shall be construed to diminish in any manner any right to display, sell, or otherwise dispose of firearms or ammunition, which is in effect before the date of the enactment of the Firearms Owners' Protection Act.

(k) Licensed importers and licensed manufacturers shall mark all armor piercing projectiles and packages containing such projectiles for distribution in the manner prescribed by the Attorney General by regulation. The Attorney General shall furnish information to each dealer licensed under this chapter defining which projectiles are considered armor piercing ammunition as defined in section 921(a)(17)(B).

(l) The Attorney General shall notify the chief law enforcement officer in the appropriate State and local jurisdictions of the names and addresses of all persons in the State to whom a firearms license is issued.

18 U.S.C. § 926. Rules and regulations

(a) The Attorney General may prescribe only such rules and regulations as are necessary to carry out the provisions of this chapter, including --

(1) regulations providing that a person licensed under this chapter, when dealing with another person so licensed, shall provide such other licensed person a certified copy of this license;

(2) regulations providing for the issuance, at a reasonable cost, to a person licensed under this chapter, of certified copies of his license for use as provided under regulations issued under paragraph (1) of this subsection; and

(3) regulations providing for effective receipt and secure storage of firearms relinquished by or seized from persons described in subsection (d)(8) or (g)(8) of section 922.

No such rule or regulation prescribed after the date of the enactment of the Firearms Owners' Protection Act may require that records required to be maintained under this chapter or any portion of the contents of such records, be recorded at or transferred to a facility owned, managed, or controlled by the United States or any State or any political subdivision thereof, nor that any system of registration of firearms, firearms owners, or firearms transactions or dispositions be established. Nothing

in this section expands or restricts the Attorney General's authority to inquire into the disposition of any firearm in the course of a criminal investigation.

(b) The Attorney General shall give not less than ninety days public notice, and shall afford interested parties opportunity for hearing, before prescribing such rules and regulations.

(c) The Attorney General shall not prescribe rules or regulations that require purchasers of black powder under the exemption provided in section 845(a)(5) of this title to complete affidavits or forms attesting to that exemption.

REGULATIONS

27 C.F.R. § 478.25a Responses to requests for information

Each licensee shall respond immediately to, and in no event later than 24 hours after the receipt of, a request by an ATF officer at the National Tracing Center for information contained in the records required to be kept by this part for determining the disposition of one or more firearms in the course of a bona fide criminal investigation. The requested information shall be provided orally to the ATF officer within the 24-hour period. Verification of the identity and employment of National Tracing Center personnel requesting information may be established at the time the requested information is provided by telephoning the toll-free number 1-800-788-7132 or using the toll-free facsimile (FAX) number 1-800-578-7223.

27 C.F.R. § 478.426 Furnishing transaction information.

(a) Each licensee shall, when required by letter issued by the Director of Industry Operations, and until notified to the contrary in writing by such officer, submit on Form 4483, Report of Firearms Transactions, for the periods and at the times specified in the letter issued by the Director of Industry Operations, all record information required by this subpart, or such lesser record information as the Director of Industry Operations in his letter may specify.

(b) The Director of Industry Operations may authorize the information to be submitted in a manner other than that prescribed in paragraph (a) of this section when it is shown by a licensee that an alternate method of reporting is reasonably

necessary and will not unduly hinder the effective administration of this part. A licensee who proposes to use an alternate method of reporting shall submit a letter application, in duplicate, to the Director of Industry Operations and shall describe the proposed alternate method of reporting and the need therefor. An alternate method of reporting shall not be employed by the licensee until approval in such regard is received from the Director of Industry Operations.